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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 75

INTERNATIONAL HARVESTER COMPANY,
APPELLANT,

vs.

TAX COMMISSIONER OF OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED MARCH 29, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 75

INTERNATIONAL HARVESTER COMPANY, APPELLANT,

vs.

TAX COMMISSIONER OF OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

INDEX

		Original	Print
Proceedings in Supreme Court of Ohio		1	1
Petition for appeal to Supreme Court of the United States		1	1
Assignments of error		3	2
Order allowing appeal		5	3
Citation	(omitted in printing)	7	
Praecipe for transcript of record	(omitted in printing)	57	
Bond on appeal	(omitted in printing)	59	
Docket and journal entries	(omitted in printing)	61	
Amended notice of appeal		64	4
Proceedings before Department of Taxation of Ohio		71	8
Certification of tax		71	8
Application for review		71a	8
Order denying application for review		73	10
Proceedings before Board of Tax Appeals, Department of Taxation of Ohio		73a	11
Notice of appeal from determination of Tax Commissioner		73a	11
Statement of proceedings		77a	16
Caption and appearances		77a	16
Testimony of John L. Johns		83a	17
A. L. Vierling		115a	42

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	Original	Print
Proceedings before Board of Tax Appeals, Department of Taxation of Ohio—Continued		
Statement of proceedings—Continued		
Appellant's Exhibits:		
1—International Harvester Company of America's branches and selling locations in 1934-5 (omitted in printing)	122	51
2—International Harvester Company's branches and selling locations in 1936-9	122a	52
5—Shipments of motor truck chassis from Springfield works, November 1, 1938 to October 31, 1939	123	53
6—Analysis of Springfield works, total cost of production, years 1934-9	123a	54
Stipulation of facts	124a	56
Decision	137	65
Petition for rehearing	148a	82
Order denying petition for rehearing	151a	86
Appellee's Exhibit "G"—Letter, International Harvester Company to Department of Taxation and enclosed exhibits and schedules	152	87
Opinion, Turner, J.	168	103
Clerk's certificate (omitted in printing)	180a	
Statement of points to be relied upon and designation of record	181	120
Order noting probable jurisdiction	185	123

[fol. 1] **SUPREME COURT OF THE UNITED STATES**

[File endorsement omitted]

INTERNATIONAL HARVESTER COMPANY, Appellant,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO, Appellee.

On Appeal From the Supreme Court of the State of Ohio

PETITION FOR APPEAL—Filed February 19, 1946

Being agreed by the final decision of the Supreme Court of the State of Ohio in the above entitled cause, the Appellant therein and herein, International Harvester Company, hereby prays that an appeal therefrom be allowed to the Supreme Court of the United States of America.

In support of this Petition for Appeal, Appellant assigns the following errors in the record and proceedings in said cause:

1. The Supreme Court of the State of Ohio erred in including in business done in Ohio, in the computation of Appellant's Ohio Franchise Taxes for the years involved in this appeal, the proceeds received by Appellant from the sale of motor trucks when the orders or contracts were solicited and accepted by branches of International Harvester Company outside the State of Ohio, and when the trucks were shipped from the Springfield plant of International Harvester Company at Springfield, Ohio, which manufactured said trucks, on the direction of said branches direct to the buyers in other states and in foreign countries, for the reason that the effect of the inclusion of said sales is to tax property and business of Appellant outside the State of Ohio, and therefore is a denial of due process of law under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

[fol. 2] 2. The Supreme Court of the State of Ohio erred in including in business done in Ohio, in the computation of Appellant's Ohio Franchise Taxes for the years involved in this appeal, the proceeds received by Appellant from the sale of motor trucks when the orders or contracts were solicited and accepted by branches of International Harvester Company outside the State of Ohio, and when the

trucks were shipped from the Springfield plant of International Harvester Company at Springfield, Ohio, which manufactured said trucks, on the direction of said branches direct to the buyers in other states and in foreign countries, for the reason that the inclusion of such sales is to lay an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the Constitution of the United States.

For which errors Appellant prays that said judgment and decision of the Supreme Court of the State of Ohio, entered November 21, 1945, in the above entitled cause, be reversed and a judgment rendered in favor of said Appellant and for costs.

Dated February 19th, 1946.

Edward R. Lewis, Joseph J. Daniels, O. H. Mosier,
Counsel for Appellant.

[fol. 3] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed February 19, 1946

In support of its Petition for Appeal in the above entitled cause to the Supreme Court of the United States, the appellant therein and herein, International Harvester Company, hereby assigns the following errors in the record and proceedings in said cause.

1. The Supreme Court of the State of Ohio erred in including in business done in Ohio, in the computation of Appellant's Ohio Franchise Taxes for the years involved in this appeal, the proceeds received by Appellant from the sale of motor trucks when the orders or contracts were solicited and accepted by branches of International Harvester Company outside the State of Ohio, and when the trucks were shipped from the Springfield plant of International Harvester Company at Springfield, Ohio, which manufactured said trucks, on the direction of said branches direct to the buyers in other states and in foreign countries, for the reason that the effect of the inclusion of said

sales is to tax property and business of Appellant outside the State of Ohio, and therefore a denial of due process of law under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of the State of Ohio erred in including in business done in Ohio, in the computation of Appellant's Ohio Franchise Taxes for the years involved [fol. 4] in this appeal, the proceeds received by Appellant from the sale of motor trucks when the orders or contracts were solicited and accepted by branches of International Harvester Company outside the State of Ohio, and when the trucks were shipped from the Springfield plant of International Harvester Company at Springfield, Ohio, which manufactured said trucks, on the direction of said branches direct to the buyers in other states and in foreign countries, for the reason that the inclusion of such sales is to lay an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the Constitution of the United States.

Dated February 19, 1946.

Edward R. Lewis, Joseph J. Daniels, O. H. Mosier,
Counsel for Appellant.

[fol. 5] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed February 19, 1946

The Appellant in the above entitled cause having this day filed its petition herein praying for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled cause by the Supreme Court of the State of Ohio on the 21st day of November, 1945, and from each and every part of said judgment adverse to said Appellant, and having presented its Petition for Appeal and Prayer for Reversal, Assignment of Errors, and Statement as to Jurisdiction pursuant to the statutes and to the rules of the Supreme Court of the United States in such case made and provided;

It is therefore now ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Ohio in the above-entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Ohio shall prepare and certify a transcript of the record, proceedings and judgment in this cause in accordance with the rules of the Supreme Court of the United States and transmit the same to the Supreme Court of the United States, so that said transcript shall be filed with said Court within forty (40) days of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of One Thousand Dollars ($1,000.00) bond for which, with Fidelity and Deposit [fols. 6-63] Company of Maryland, as surety thereon, is now presented by Appellant, is approved, and ordered filed with the Clerk of this Court.

Entered at Columbus, Ohio, this 19th day of February, 1946.

Carl V. Weygandt, Chief Justice of the Supreme Court of the State of Ohio.

[fol. 64] IN THE SUPREME COURT OF OHIO

No. 30316

INTERNATIONAL HARVESTER COMPANY, Appellant,

vs.

WILLIAM S. EVATT, Tax Commissioner of Ohio, Appellee

AMENDED NOTICE OF APPEAL

International Harvester Company, Appellant in the foregoing cause, hereby appeals from the decision of the Board of Tax Appeals, Department of Taxation of Ohio, rendered on February 14, 1945, in its cause No. 7994.

In its decision the said Board of Tax Appeals modified the action of the Tax Commissioner in making the assessments complained of and, as modified, affirmed them.

The assessments complained of were assessments of Ohio Franchise Taxes against Appellant, International Harvester Company, for the years 1935 to 1940 inclusive, the amount for each year being set out below.

Year	Fee
1935	$ 26,978.70
1936	31,416.71
1937	27,112.04
1938	23,787.15
1939	25,390.28
1940	29,882.66
	$ 164,567.54

In its decision the said Board of Tax Appeals modified the determination of the Tax Commissioner by excluding [fol. 65] from the amount of Ohio business of the Appellant, International Harvester Company, all sales of motor trucks produced at its factory at Springfield, Ohio, where the trucks were shipped from the factory to the branches of International Harvester Company all over the United States, and later sold by those branches to dealers and consumers.

The decision of said Board of Tax Appeals stated:

> "From a full consideration of the evidence and the stipulations, the Board finds that in each of the years 1936 to 1939, inclusive, 62% of the sales of goods manufactured in Ohio and sold to customers in states other than Ohio was sold from warehouses outside the state and, therefore, should be excluded from the numerator of the business fraction in determining the base for the purpose of computing the franchise fee for the years 1937 to 1940, inclusive, and in this respect the action of the tax commissioner is modified."

The Ohio Board of Tax Appeals affirmed the action of the Tax Commissioner in including in Ohio business of the Appellant all sales of motor trucks produced at the Appellant's plant at Springfield, Ohio, where the orders or contracts were solicited by salesmen of the branches of the Company outside of Ohio, the orders or contracts were accepted by the branches outside of Ohio, and the trucks were shipped on the direction of said branches by the factory at Springfield, Ohio, direct to the buyer, either dealer or consumer, in states outside of Ohio.

The Appellant herein contended in its Appeal to said Board of Tax Appeals that the taxes as assessed by the Tax Commissioner denied the Appellant due process of law

under the Fourteenth Amendment to the United States Constitution, and were a burden on interstate commerce in violation of the Commerce Clause of the United States Constitution.

[fol. 66] Said Board of Tax Appeals in its decision held that the tax assessments in question violated neither the Due Process Clause nor the Commerce Clause of the United States Constitution.

Errors Complained Of

Appellant complains of the following errors in said decision of the Ohio Board of Tax Appeals:

(1) The Board erred by sustaining the Tax Commissioner in including in the basis of his assessments, sales of motor trucks in the years in question where the orders or contracts were solicited and accepted by branches of International Harvester Company outside of the State of Ohio, and where the trucks were shipped from the Springfield Works of International Harvester Company at Springfield, Ohio, on the direction of said branches direct to the buyers in other states, for the reason that said sales are not Ohio business under the terms of the Ohio Franchise Tax Act.

(2) The Board erred in including in business done in Ohio sales of motor trucks produced at the Springfield Works of International Harvester Company at Springfield, Ohio, where the orders or contracts were solicited and accepted by branches of the Appellant outside Ohio and the trucks were shipped by the factory at Springfield, Ohio, direct to buyers in other states on direction of said branches, for the reason that the effect of the inclusion of said sales is to tax property and business of Appellant outside the State of Ohio, and therefore is invalid under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

(3) The Board erred in including in business done in Ohio sales of motor trucks produced at the Springfield [fol. 67] Works of International Harvester Company at Springfield, Ohio, where the orders or contracts were solicited and accepted by branches of the Appellant outside Ohio and the trucks were shipped by the factory at Springfield, Ohio, direct to buyers in other states on direction of

said branches, for the reason that the inclusion of such sales is to lay an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the Constitution of the United States.

(4) Said Board of Tax Appeals erred by assessing the tax for the 10 months' fiscal year ended October 31, 1936, namely the period from January 1 to October 31, 1936, on a full year's basis, whereas said period was only a 10 months' period and the tax should have been reduced to five-sixths of the annual tax.

(5) The said Board of Tax Appeals erred in its decision by making no deduction for the amount of goods sold by branches of the Company in Ohio when the goods were shipped direct from factories or transfer houses of the Company outside Ohio to buyers in Ohio, while at the same time it included in Ohio business the amount of sales of trucks sold on orders or contracts solicited and accepted by branches of the Company outside of Ohio, when the goods were shipped from the factory at Springfield, Ohio, direct to buyers in other states.

For which errors Appellant prays that said Entry of the Board of Tax Appeals, Department of Taxation of Ohio, entered February 14, 1945 in the above entitled cause, be reversed and judgment rendered in favor of Appellant for the reasons hereinabove set out.

A copy of the Entry of the Board of Tax Appeals, De-
[fols. 68-70] partment of Taxation of Ohio, in the above entitled cause, No. 7994 on the docket of said Board of Tax Appeals, is attached hereto and made a part hereof.

O. H. Mosier and Edward R. Lewis, Attorneys for Appellant.

March 19, 1945.

(The "Entry", dated Feb. 14, 1945, of the Board of Tax Appeals, Department of Taxation of Ohio, in which is contained the judgment and opinion of said Board of Tax Appeals, in the cause below, International Harvester Company, Appellant vs. William S. Evatt, Tax Commissioner, No. 7994, is set out in the printed Record of the Supreme Court of Ohio, pages 121 to 144.)

[fol. 71] BEFORE THE DEPARTMENT OF TAXATION OF OHIO

In the Matter of the Application of the International Harvester Company, Chicago, Illinois, for Review and Correction of Franchise Tax Certified to the Treasurer of State, July 29, 1941, Against Such Company for the Years 1935 to 1940, Both Inclusive.

FOREIGN ARREARAGES CORPORATIONS CERTIFIED TO ATTORNEY GENERAL JULY 25, 1941.

Dept. No.	Name of Company, Address	Year Del.	Amount on which charge based			Tax
1869	International Harvester Co., R. E. McDowell, 180 N. Michigan Ave., Chicago, Ill.	1935	26	978	699	$26,978.70
		1936	31	416	710	31,416.71
		1937	27	112	037	27,112.04
		1938	23	787	150	23,787.15
		1939	25	390	283	25,390.28
		1940	29	882	657	29,882.66
				Total		$164,567.54

[fol. 71-A] BEFORE DEPARTMENT OF TAXATION OF OHIO

APPLICATION FOR REVIEW—Filed August 29, 1941.

To the Honorable Department of Taxation of Ohio, Columbus, Ohio.

Re: Additional Assessments of Ohio Franchise Taxes Against International Harvester Company Under Section 5461, General Code, for the Years 1935, 1936, 1937, 1938, 1939 and 1940.

Gentlemen:

The International Harvester Company has received from Don H. Ebright, treasurer of the state of Ohio, 1940 foreign franchise fee notice, for additional Ohio foreign franchise taxes against the International Harvester Company for the years 1935 to 1940, inclusive, in the following amounts:

	Valuation	Fee
1935	$26,978,699.00	$26,978.70
1936	31,416,710.00	31,416.71
1937	27,112,037.00	27,112.04
1938	23,787,150.00	23,787.15
1939	25,390,283.00	25,390.28
1940	29,882,657.00	29,882.66
		$164,567.54

We have also received a letter, dated July 30, 1941, signed by Wm. M. Pearson, chief of the franchise division, enclosing a certified copy of the journal entry, dated July [fol. 72] 29, 1941, stating that the application of the International Harvester Company for review and correction of the franchise valuation certified against it for the years 1935 to 1940 has been considered and that the tax commissioner "finds that such assessments as made by the Department of Taxation are correct and in accordance with the franchise tax laws as interpreted by the attorney general of Ohio" and that the application for review and correction is, therefore, denied.

The International Harvester Company received original notice from the Department of Taxation of additional franchise taxes, dated March 25, 1941, proposing to assess taxes in the amount of $271,153.72 for the years 1935 to 1940 inclusive. Thereupon the International Harvester Company filed its protest under date of April 24, 1941, and a conference was held on May 21 at which the International Harvester Company was represented by C. L. Johns, its auditor of tax returns, and Edward R. Lewis, its attorney, and the Department of Taxation was represented by Mr. Wm. S. Evatt, tax commissioner, Wm. Pearson, chief of the franchise division, Fred M. Wildermuth, special examiner, franchise division, and J. W. Foley, examiner in the franchise tax division.

Thereafter, on July 9, 1941, the International Harvester Company submitted a statement of its argument on the legal questions involved, on the understanding that the matter would be referred to the attorney general of Ohio for his opinion. After receiving the above letter of July 30, 1941 from Mr. Wm. M. Pearson, enclosing a certified copy of the journal entry of the tax commissioner for re-

[fol. 72-A] view and correction, I called up Mr. Pearson on long distance telephone and was told that the matter is now in the hands of the attorney general, and that the International Harvester Company has no further steps to take until action is taken by the attorney general.

The notice of assessment from the treasurer of the state of Ohio is for $164,567.54. The amount has been reduced after presentation of various exhibits and schedules by the taxpayer from the amount proposed in the original letter of the Department of Taxation of March 25, 1941, wherein it was stated that it was proposed to assess additional franchise taxes amounting to $271,153.72.

The taxpayer accordingly makes herewith application for review and correction of said additional franchise taxes for the years 1935 to 1940, and in support of this application desires that its memorandum of July 8, 1941, submitted with its letter of July 9, 1941, to Mr. Wm. S. Evatt, tax commissioner, be considered as submitted in support of this application for review and correction, together with its statements of April 25, 1941 and April 24, 1941, addressed to the Honorable Department of Taxation of the state of Ohio.

Yours very truly, International Harvester Company, by Edward R. Lewis.

ERL*F

[fol. 73] BEFORE DEPARTMENT OF TAXATION OF OHIO

RIDER DENYING APPLICATION FOR REVIEW—Entered December 2, 1943.

The application of the above company for review and correction of franchise tax arrearages, certified to the treasurer of state July 29, 1941, for the years 1935 to 1940, both inclusive, having been filed August 28, 1941, came on for consideration, and hearing having been had, the tax commissioner denies such application as of December 2, 1943.

Department of Taxation, William S. Evatt, Tax Commissioner.

[Duly certified.]

[fol. 73-A] BEFORE BOARD OF TAX APPEALS,
DEPARTMENT OF TAXATION OF OHIO

INTERNATIONAL HARVESTER COMPANY, Appellant,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO, Appellee.

NOTICE OF APPEAL.

International Harvester Company, a corporation of the state of New Jersey with general offices in Chicago, Illinois, appellant herein, hereby appeals from the determination by William S. Evatt, tax commissioner of the state of Ohio, dated December 3, 1943, which stated:

> "The application of the above company for review and correction of franchise tax arrearages, certified to the treasurer of state July 29, 1941, for the years 1935 to 1940, both inclusive, having been filed August 28, 1941, came on for consideration, and hearing having been had, the tax commissioner denies such application as of December 2, 1943."

A true copy of said notice sent by the commissioner is attached hereto.

Said application of the appellant herein for review and correction asked for review and correction of the [fol. 74] franchise tax valuations set forth in notice from the treasurer of state of Ohio, not dated, but stating that there would be 15% penalty if not paid on or before August 30, 1941, the valuations set forth and additional franchise tax fees claimed due therefor being as follows:

	Valuation	Fee
1935	$26,978,699.00	$26,978.70
1936	31,416,710.00	31,416.71
1937	27,112,037.00	27,112.04
1938	23,787,150.00	23,787.15
1939	25,390,283.00	25,390.28
1940	29,882,657.00	29,882.66
		$164,567.54

The appellant herein specifies errors in said franchise tax valuations and the additional fees based thereon, as follows:

(1) Said additional franchise tax valuations and franchise tax fees based thereon are erroneous in that said franchise tax valuations include in the numerator of the fraction of "business done", sales of appellant's products produced by its plant at Springfield, Ohio, which sales were made by branches of the appellant outside of Ohio.

Appellant contends that such sales are not business done in Ohio, and that the inclusion of such sales in the figure of Ohio business done results in allocating to Ohio an arbitrary and excessive proportion of the total net worth of the company, and accordingly that the assessments based on such a method would result in taxing property and busi-[fol. 74-A] ness of the International Harvester Company outside the state of Ohio, and deny due process of law under the Fourteenth Amendment of the Constitution of the United States.

(2) Rule No. 275 adopted by the tax commissioner of Ohio under date of October 13, 1939, provides as follows, to wit:

> "Rule No. 275. Business done in and out of Ohio. —Business done in and out of Ohio by a corporation subject to the payment of franchise taxes shall be determined under Section 5498, General Code, by allocating to the business fraction therein provided sales in and out of Ohio.
>
> All sales of goods from warehouses in Ohio, wherever manufactured, shall be considered as Ohio sales.
>
> In the case of manufacturing companies, all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state.
>
> The denominator of such business fraction shall in all cases be the total sales wherever made."

Appellant, however, submits that in the assessments involved in this appeal no deduction has been made for products of the appellant manufactured in Ohio, which were sold from warehouses outside of Ohio, and no deduction has been made for products manufactured outside Ohio and shipped by the outside factory direct to a

dealer in Ohio, and to that extent the assessments are in violation of said Rule No. 275.

[fol. 75] (3) Furthermore, since said Rule No. 275 was not adopted until October 13, 1939, it was adopted after the end of the fiscal years of the appellant on which the franchise taxes involved in this appeal were based, the franchise tax being in each year based on business done in the year prior thereto, except the fiscal year ending October 31, 1939, on which the franchise tax for 1940 was based, and in the case of the fiscal year ending October 31, 1939 said Rule No. 275 was adopted only 18 days before the end of such year.

Appellant contends, therefore, that said Rule No. 275 cannot lawfully be applied retroactively to the years prior to its adoption.

Moreover, appellant contends that it is inequitable to apply said rule retroactively. Said Rule No. 275 treats as business done in Ohio sales of goods by branches in other states which, under appellant's method of doing business, are never treated as business done in the state where the manufacturing operations are carried on. Appellant has no figures of sales in the years 1934 to 1938 inclusive of goods produced by its Springfield Works, Springfield, Ohio, which were completed by shipments from said Springfield Works direct to buyers in other states, and such figures cannot now be obtained. By considerable effort, appellant has obtained such figures for the year ending October 31, 1939 by examining more than 58,000 invoices of shipments of motor trucks from the Springfield Works to dealers in other states.

(4) Appellant further contends that the application of Rule No. 275 results in treating as business done in [fol. 75-A] Ohio, sales which are not made in Ohio but in other states, and that the assessments based on Rule No. 275 would result in taxing property and business of the International Harvester Company outside of the state of Ohio, and would therefore deny due process of law under the Fourteenth Amendment of the Constitution of the United States.

(5) Appellant further contends that under said Rule No. 275 Ohio includes as business done in Ohio, sales by branches outside the state of Ohio to purchases outside

the state of Ohio, and yet in many states, both for franchise taxes and for income taxes, the states require and the appellant pays franchise and income taxes, using as a measure for the proportion of the franchise tax value or the proportion of income allocated to the state the sales made by branches in that state to buyers in that state, or in many cases to buyers wherever situated, and that accordingly said Rule No. 275 will result in the same sales being used as the measure of taxes both in the state where the branch is located and in the state of Ohio in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution.

(6) Said Rule No. 275, set out above, states that in the case of manufacturing companies "all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state."

In the assessments herein involved, there is included in the numerator of the fraction of business done in Ohio, the sales of products of the Springfield Works, Springfield, Ohio, which were effected by branches outside the [fol. 76] state of Ohio. In those sales the orders or contracts of sale were obtained by salesmen employed by branches outside the state of Ohio, or were received by mail by said branches, the proceeds of the sales either in notes or cash were received and collected by branches outside the state of Ohio, and the branches outside the state of Ohio supervised the transaction from beginning to end.

Appellant contends that all sales of Springfield Works' products made by branches of the International Harvester Company located outside the state of Ohio are "sold from warehouses outside of this state." Said Rule No. 275 does not require that the goods be delivered from a warehouse outside the state, but merely that they be sold from warehouses outside the state.

Appellant contends accordingly that where goods are shipped from the Springfield Works direct to buyers in other states on orders and contracts taken and accepted by branches in other states, where such out of state branches receive the proceeds and handle the sales from beginning to end and direct the Springfield Works to ship to the purchasers, that the sales are made from warehouses outside the state of Ohio.

(7) Pursuant to Section 1464-4 of the General Code of Ohio, appellant makes application herewith for a review of said Rule No. 275 on the ground that said rule is unreasonable and is unauthorized for the following reasons:

The Ohio Franchise Tax Law, General Code of Ohio, Section 5498, provides that the value of the outstanding stock of a foreign corporation shall be divided into two [fol. 76-A] parts and that one-half of such value shall be multiplied by a fraction whose numerator is the fair value of the corporation's property owned and used by it in Ohio, and whose denominator is the fair value of all its property wherever situated, eliminating good-will, and the other half of the capital stock value shall be multiplied by a fraction whose numerator is the "value of the business done by the corporation in this state" and whose denominator is "the total value of its business" during the year in question. Said Rule No. 275 provides that there shall be treated as business done in Ohio, all sales of goods manufactured in Ohio wherever situated, except sales of goods sold from warehouses outside of Ohio. No authority is granted the tax commissioner to define the words "business done" to include sales made outside the state of Ohio.

Said Rule No. 275, moreover, is inconsistent as it treats as business done in Ohio all sales of goods sold from warehouses in Ohio, although some of said goods were manufactured outside of Ohio; and on the other hand, treats as business done outside of Ohio all sales of goods sold from warehouses outside of Ohio, although some of said goods were manufactured in Ohio.

Said Rule No. 275 is, therefore, based neither on sales in Ohio nor on manufacturing activity in Ohio, but on a combination of sales and manufacturing activity.

Appellant further contends that the Ohio Franchise Tax is not levied on the manufacturing activity, but on the privilege of doing business in the state of all kinds, manufacturing, selling and other activities, and that Rule No. 275 in attempting to base one-half the tax on [fol. 77] manufacturing activity is in violation of the provisions of the Ohio Franchise Tax Law.

Respectfully submitted this twenty-fourth day of December, 1943.

International Harvester Company, by Edward R. Lewis, its Attorney.

NOTICE

In the Matter of the Application of the International Harvester Company, Chicago, Illinois, for Review and Correction of Franchise Tax Certified to the Treasurer of State July 29th, 1941, Against Such Company for the Years 1935 to 1940, Both Inclusive

(December 3, 1943.)

The application of the above company for review and correction of franchise tax arrearages, certified to the treasurer of state July 29, 1941, for the years 1935 to 1940, both inclusive, having been filed August 28, 1941, came on for consideration, and hearing having been had, the tax commissioner denies such application as of December 2, 1943.

Department of Taxation, William S. Evatt, Tax Commissioner.

I hereby certify the foregoing to be a true and correct copy of the action of the department of taxation this day taken by the tax commissioner with respect to the above matter.

William S. Evatt, Tax Commissioner.

[fol. 77-A] BEFORE BOARD OF TAX APPEALS OF OHIO

PROCEEDINGS

Before Honorable William J. Ford, Chairman, Robert M. Hance and Robert H. Hoffman, Members, Board of Tax Appeals, Department of Taxation of Ohio, Thursday, September 28, 1944, at the Hearing Room of the Board of Tax Appeals, Ohio Departments Building, Columbus, Ohio.

Morning Session, Thursday, September 28, 1944.

Chairman Ford: Before the Board of Tax Appeals, Department of Taxation of Ohio, International Harvester Company, appellant, against William S. Evatt, appellee, Case Number 7994; appeal filed by the appellant under

date of December 27, 1943, from an order of the tax commissioner under date of December 3, 1943, denying an application for a review and correction of a determination of the order of the tax commissioner, which, under the assumed authority of Section 5461, General Code, made back tax assessments of corporation franchise taxes on the appellant for the tax years 1935 to 1940 inclusive.

Appearances? Who represents the appellant?

Mr. Lewis: Edward R. Lewis, attorney, representing the appellant.

Chairman Ford: And the attorneys representing the appellee?

Mr. Graham: Thomas J. Herbert, attorney general, by Perry L. Graham, chief counsel.

Chairman Ford: Case heard before the Board of Tax Appeals at the hearing room of the board at Columbus, [fol. 78-83] Ohio, September 28, 1944, Hance, Hoffman and Ford, members present.

[fol. 83-A] CHARLES L. JOHNS, called on behalf of the appellant, being first duly sworn, testified as follows:

Examined by Mr. Lewis:

Q. Will you state your name and position?

A. Charles L. Johns. I am the auditor of tax returns of the International Harvester Company. I have held that position since 1936. That was a new position or title created at that time. However I have been employed by the company for 33 years.

Q. You have been now?

A. I have been employed, yes, and 24 years of that time I have been working on tax matters at least part of the time and for the last several years, or the last five or six years, 100% of the time. My duties at the present time are to supervise the preparation in the accounting department of all of the federal income tax returns, the federal social [fols. 84-89] security tax returns, the state income tax returns, the state franchise tax returns and certain personal property tax returns and a variety of others.

Q. As auditor of tax returns you are responsible for the state income and state franchise tax returns filed by the company?

A. I am responsible for the figures contained therein, that is correct.

Q. You are familiar with the returns the International Harvester Company has filed in the various states, are you?

A. Yes, sir.

[fol. 90] By Mr. Lewis:

Q. Mr. Johns, I hand you what has been marked for identification as Appellant's Exhibit No. 2; did you prepare that statement (handing paper to witness)?

A. Yes, sir, I did.

Q. What does it show; what does it purport to show?

A. Branches and selling locations in the United States in the years 1936 to 1939 inclusive of International Harvester Company.

Q. It shows the branches? Does it show any retail stores or motor truck sub-stations?

A. Yes, sir, it does.

Q. And it shows the states in which the International Harvester Company had no selling locations from 1936 to 1939, does it?

A. That is correct.

Q. Was that schedule prepared under your supervision or did you prepare it yourself?

A. Under my supervision.

Mr. Lewis: We offer Appellant's Exhibit No. 2 in evidence.

Mr. Graham: I object on the ground of materiality only.

Chairman Ford: What is the objection?

Mr. Graham: It is immaterial to the issues in this case.

Chairman Ford: At the present time we don't know whether it is material or not. We don't know how he did business.

Mr. Lewis: We expect to explain that.

Chairman Ford: Very well.

By Mr. Lewis:

Q. Mr. Johns, referring to Appellant's Exhibit No. 2, you list 35 states in which the International Harvester Company in the year 1936 to 1939 had branch houses. Will [fol. 91] you describe briefly to the board how the branch house operated in those years?

A. At the head of the branch house organization was a branch manager. Assisting him was an assistant branch manager, and under these two gentlemen were the complete sales and accounting organization. The branch house was usually either owned—a warehouse was maintained at each of these locations, branch house locations. It was either owned by the company or rented. The branch manager sent his salesmen out to solicit orders in the territory to which he was assigned. The orders came back to the branch and were accepted by the branch manager. The goods were either shipped from the branch warehouse or from a factory or from a transfer house of the company.

Q. Shipped on order of whom; who gave the shipping order?

A. The branch manager or someone in his organization.

Q. Someone in the branch house sent the shipping order to the factory?

A. Yes, to the factory, by way of the Chicago general office.

Q. And the goods would be shipped from the factory either to the branch or to the dealer, is that correct?

A. That is correct.

Q. Who approved the orders and contracts?

A. I already stated that, the branch manager.

Q. The branch manager; then who received the cash and notes on the sales?

A. They were received by the branch house which originally took the order.

Q. And the notes were held where?

A. The notes were held in the branch until they became [fol. 91A-95] due and then they were sent to banks for collection or collected by our own collection organization.

Q. Did the factory approve any contracts or orders, accept any orders or approve any contracts?

A. The factory didn't approve any contracts.

Q. Did it receive any cash on notes on the sales?

A. Which factory are you referring to?

Q. Any factory.

A. No factory received any cash on the sales negotiated by the branch houses.

Q. Did the Springfield Works of International Harvester Company receive any cash or notes from the sales?

A. It may have made some local sales of repair parts for which it received cash—no, it doesn't handle repairs.

Chairman Ford: What years are you talking about?

Mr. Lewis: 1936 to 1939 when International Harvester Company did its own distributing.

Chairman Ford: Is that true?

The Witness: That is true, 1936 to 1939, that is true.

Mr. Grahain: That is covered in the stipulation except as to Wisconsin and the foreign countries.

By Mr. Lewis:

Q. And for Wisconsin we show the International Harvester Company of America stayed in business——

A. Until October 30th, 1939.

Q. You are familiar with the franchise tax returns of International Harvester Company filed in the various states, are you not?

A. Yes, sir.

[fol. 96] By Mr. Lewis:

Q. Mr. Johns, you have been familiar with the franchise tax returns in the state of Ohio of International Harvester Company for the years 1934 to 1939 inclusive, the business years, fiscal years?

A. Yes, sir.

Q. You are familiar with the assessments that have been made by the tax commissioner in this appeal, are you?

A. Yes, sir.

Q. I will ask you if any deductions have been made in arriving at the assessments arrived at in this appeal [fol. 97] and any deductions have been made for goods of Ohio manufacturers sold from warehouses of the International Harvester Company outside of Ohio?

Mr. Graham: I object.

Chairman Ford: The witness may answer.

The Witness: No, sir.

By Mr. Lewis:

Q. I will ask you next if, in arriving at the assessments involved in this appeal, any deduction has been made for the value or amount of goods manufactured outside of Ohio by the company outside of Ohio and shipped direct to Ohio buyers on sales made by Ohio branches?

A. No, sir.

Q. Going back to this question of these state franchise and income taxes, I will ask you to state in how many

states, in addition to Ohio, does International Harvester Company file franchise tax returns.

Mr. Graham: I object. I don't know what difference it makes.

Chairman Ford: It may be preliminary. I thought he did answer that before.

The Witness: I answered that before.

By Mr. Lewis:

Q. In the franchise tax returns of the International Harvester Company in reporting sales in the state, the total sales in those franchise tax returns, I will ask you if in any case International Harvester Company has excluded sales of goods of Ohio manufacturers.

Mr. Graham: I object.

Chairman Ford: We will sustain the objection. You may proffer the evidence.

[fol. 97-A] Mr. Lewis: We propose to prove by the answer to this question that in the franchise tax returns in the states that the witness has testified to, that the company makes franchise tax returns, it has included as sales in the taxing state all sales made by the branches in that state either to those who are residents of the state or to buyers wherever resident, according to the requirements of the state, and not only that but all sales made by the branch, irrespective of the place of manufacture.

Chairman Ford: On that point let me ask you, do you in any of your tax reports make any return as to sales of goods in any particular state which is manufactured in other states? Do you make a return of your sales in such case in any other instance except where the law of that state requires you to do it?

The Witness: I don't know of any law where we are not required to do it.

Chairman Ford: The answer is you do not make it unless the law of that particular state requires you to make the return?

The Witness: That is right, yes, sir.

Chairman Ford: Whatever you include in that return is that which is required by the law of that state?

The Witness: Yes, sir.

By Mr. Lewis:

Q. The company in these nine states files franchise tax returns in each state, part of which is based upon sales in the state total sales?

Mr. Graham: I object.

The Witness: That is correct.

Chairman Ford: Proceed. Let the answer stand.

[fol. 98] By Mr. Lewis:

Q. Mr. Johns, to make that clear before the board, do I understand that in reporting sales in the franchise tax returns the question of sales in the state is governed entirely by the question of which branch made the sales and not by the question of where the goods were manufactured?

A. That is correct.

Mr. Graham: I object.

Chairman Ford: Objection overruled.

By Mr. Lewis:

Q. Referring to these state income tax returns, I believe you testified that in 32 states and the District of Columbia, International Harvester Company in 1939 filed state income tax returns?

A. That is correct.

Q. I will ask you if on those returns in each case in each of those 32 states and the District of Columbia the sales of the company in that state and the District of Columbia are not an element—I will ask you if on the income tax return in those 32 states and the District of Columbia if the element of sales in that state and the District of Columbia—if the amount of sales in that state and the District of Columbia is not required to be returned?

Mr. Graham: I object.

Mr. Lewis: I will withdraw the question.

Chairman Ford: Very well.

By Mr. Lewis:

Q. I will ask you in the state income tax return in those 32 states and the District of Columbia if the International Harvester Company on the returns supervised by you did not in each case report sales in that state on those returns?

[fol. 98-A] Mr. Graham: I object.

Chairman Ford: The answer to the question will be taken subject to reservation. It will be decided on the merits of the case. We don't know what the Supreme Court is going to say and so we will take it subject to reservation.

The Witness: Sales were reported in each one of those state income tax returns.

By Mr. Lewis:

Q. And the sales that were reported were the sales made by branches in the state?

A. Yes, sir.

Mr. Graham: I desire to object to all this line of testimony.

Chairman Ford: The answer is the same; you don't return anything on those income tax returns by way of income or receipts that the law doesn't require you to return, the law of that particular state?

The Witness: That is true, but we are seeking here the allocation formula only.

By Mr. Lewis:

Q. I will ask you if in the case of any one of these 32 states and the District of Columbia any amount of sales was excluded from sales of that state because the goods were not manufactured in that state?

A. No, sir.

Mr. Graham: Does the record show a continuing objection?

Chairman Ford: Yes, and the record shows that we are taking these answers to these particular questions subject to reservation.

Mr. Lewis: You may cross examine.

[fol. 99] Cross-examination.

By Mr. Graham:

Q. Mr. Johns, in 1935 did you prepare the return of the International Harvester Company for the purpose of state franchise tax in Ohio?

A. That is based on 1934 figures? It was prepared by one of my men. I am familiar with it.

Q. Did you file it? When were you first the tax auditor of this company?

A. I first had that title in 1936, but I was doing this same kind of work.

Q. You were familiar with the preparation of the return as filed in 1935, were you?

A. Yes, sir.

Q. And were you familiar with the return for the year 1936 when it was filed?

A. That is the return for 1936 based on 1935 figures? We seem to be getting mixed up here. That is based on 1935 figures. I am familiar with that also.

Q. Were you familiar with it at the time it was filed?

A. Yes, sir.

Q. Were you familiar with the annual report filed by the appellant for the year 1937?

A. Yes, sir.

Q. At the time it was filed?

A. Yes, sir.

Q. I will ask you the same question with respect to the annual report of the company filed for the year 1938; were you familiar with that at the time it was filed.

A. Yes, sir, I was.

Q. I will ask you also whether you were familiar with the annual report of the appellant filed for the year 1939 at the time it was filed?

A. Yes, sir.

[fol. 99-A] Q. I will ask you also with respect to the annual report filed for the year 1940, whether or not you were familiar with that report at the time it was filed.

A. Yes, sir.

Q. After those returns were filed did you file any further papers with respect to those returns?

A. Not until after Mr. Foley came in and made an examination.

Q. Mr. Foley made an examination; what kind of an examination did he make?

A. Mr. Foley came in and I just can't recall how much he went into our records, but he asked us for a lot of additional information that was very difficult to get because it was information that we didn't have readily available on our

records, so I think you have all of Mr. Foley's files, and it will show that that information was furnished and the dates and what it was all about.

Q. You furnished him with further information with respect to your corporation, did you?

A. Yes, sir.

Q. And was that taken from your records?

A. It must have been taken from our records, yes.

Q. You gave him certain information for the purpose of his examination, did you?

A. That is right.

Q. In connection with the examination?

A. That is right.

Q. Did you give him any figures that were incorrect?

A. We gave him some figures as I remember, motor truck shipments and average price of trucks or total volume of sales or something, from which Mr. Foley determined an average price per unit.

Q. Did you give him any information that was incorrect?

A. No, sir. I am trying to explain—o. k.

[fol. 100] Q. In 1940 did you have any conferences with Mr. Foley in connection with these returns?

A. We had in 1940 in the offices at Chicago, in December of 1940. That was when he made his examination.

Q. He made the examination then in December of 1940?

A. Yes, that is right.

Q. Did you have any further conferences with Mr. Foley after December, 1940, with respect to these returns?

A. Yes, sir.

Q. I am handing you the board's transcript furnished by the tax commissioner and I will ask you to examine the correction sheets and I will ask you if you ever received a copy of those (handing documents to witness).

A. Yes, sir, I received all those.

Q. After that did you have some further discussion or controversy with Mr. Foley or with somebody else in the tax department with respect to those returns?

A. We had very little correspondence after that and no conferences after that.

Q. Did you ever get any correction sheets after that time?

A. No, sir.

Q. I am handing you herewith a paper marked for purposes of identification as Appellee's Exhibit A, and I will ask you if you have ever seen that or a copy of it (handing paper to witness).

A. Yes, I have seen a copy of it.

Q. Did you have a conference with Mr. Foley or with anybody else at the time—at or about the time that corrected sheet was put out?

A. As I recall, no, sir.

Q. Handing you the Board of Tax Appeals' transcript, the tax commissioner's transcript filed with the Board [fol. 100-A] of Tax Appeals, calling your attention to line 17, item 17——

A. What year is that?

Q. Being the corrected sheet for the year 1935, I will ask you to examine line 17 being labeled "Amount of Ohio Business", the item in this first column——

Chairman Ford: What are you referring to, Mr. Graham?

Mr. Graham: The correction sheet which is in the transcript with respect to the year 1934.

Chairman Ford: The tax year 1935 and business done in 1934?

Mr. Graham: As of the year ended December 31, 1934, appearing in the column headed "As corrected $25,841,096."

Chairman Ford: Very well.

By Mr. Graham:

Q. I call your attention to line 17, being the item labeled "Amount of Ohio business as corrected" under the column "As corrected $17,377,675". I will ask you whether you had any conference or hearing prior to that correction.

A. Yes, we did. We had a conference here in Columbus and we had some correspondence in the intervening period before December, 1940, and at the time this assessment was made.

Q. You had correspondence?

A. Correspondence and also a conference.

Q. Do you remember what your claim was for the reduction?

A. I certainly do.

Q. What was it?

A. In the first place Mr. Foley got an average price, average selling price of motor trucks which was based—which he arrived at by taking our motor truck sales, divid-
[fol. 101] ing it by the total units sold and he arrived at an average price. Then he took the number of Springfield units sold and applied that average price against it. That distorted the sales of the Springfield product because at Springfield we make only small trucks while at Fort Wayne we make big trucks, and the average for Springfield was thereby increased over what it should have been, so that was called to Mr. Foley's attention, and that was called to his attention I think at a conference here in this building, and then we went back to Chicago and we gave Mr. Foley a different figure. We took our total sales proceeds of motor trucks and we were able to divide that between the Springfield product and the Fort Wayne product. I am speaking of total proceeds, everything all over the United States that the company sold. We divided that total between Springfield and Fort Wayne, and Mr. Foley included the entire proceeds from the sales of Springfield trucks in this assessment.

Chairman Ford: In the corrected unit price?

The Witness: No, sir, I disregarded the unit price. We had the total sales of motor trucks in the United States divided between the Springfield product and the Fort Wayne product.

By Mr. Graham:

Q. As a matter of fact you also had further conferences with him with respect to what you claim were sales made from warehouses outside the state and you claimed that those were exempted under the rule of the tax commissioner, didn't you?

A. We didn't have any further conference.

[fol. 101-A] Q. At that conference?

A. Yes, at that conference I think that matter was brought up.

Q. And he made you an allowance for that at that conference, didn't he?

A. Oh, no, he didn't make any allowance.

Q. In making the corrections there were corrections made at that same time with respect to the subsequent years, weren't there?

A. Yes, there were corrections made when he got my revised figures, which were correct figures for the total sales of the Springfield product; he sent in these corrected assessments and they brought it down from 271,000 to 164.

Q. I will hand you herewith certain papers which for identification have been marked as Appellee's Exhibits B, C, D, E and F, and I will ask you whether you ever received copies of those (handing papers to witness).

A. Yes, sir, I received copies of those.

Q. Those are the correction sheets upon which the tax was paid from which you filed this appeal, isn't that right?

A. Yes, sir.

Mr. Graham: May we offer these in evidence as part of our cross examination?

Chairman Ford: Do you want to offer them now?

Mr. Graham: I think they should be in as part of the cross examination.

Chairman Ford: Is there any objection?

Mr. Lewis: I have no objection.

Chairman Ford: Then they may be admitted.

And thereupon the documents above referred to are admitted in evidence on behalf of the appellee, and are [fol. 102] herewith submitted and marked respectively Appellee's Exhibits A to F inclusive.

By Mr. Graham:

Q. Mr. Johns, what is the nature of your job with the International Harvester Company; you are in the accounting department, aren't you?

A. That is right.

Q. You deal in what, tax work, exclusively since——

A. Since 1936 approximately 100%.

Q. Approximately 100% in that work, tax work, since that time?

A. Yes, sir.

Q. Prior to 1936 I understood you to say you did substantially the same work during 1935.

A. That is right, all the way back——

Q. But you didn't have the title?

A. I didn't have the title.

Q. In 1934 and 1935 you did the same work and substantially 100% of your time was devoted to tax work for the International Harvester Company?

A. Not in 1934 and 1935 it wasn't.

Q. What did you do in 1934 and 1935 other than tax work?

A. A lot of other general accounting work.

Q. So that after 1936 in addition to having the accounting, you got rid of a lot of this accounting work.

A. Yes, sir. I used to do the tax work and the other work too. The work has just about trebled.

Q. You don't have any functions in connection with the manufacturing business other than the tax accounting, do you?

A. None whatever.

Q. Your duties during 1934 and 1935 were purely accounting, were they?

A. Purely accounting.

[fols. 103-105] Q. That is on tax and other accounting that they happened to dump on your lap?

A. That is right.

Q. You never worked in the sales end of the company, did you?

A. Yes, I have.

Q. I mean during 1934——

A. I misunderstood you. I am answering your question too hurriedly. I never worked in the sales department of the company.

Q. Your experience was as an accountant?

A. I have worked in sales accounting.

Q. But not in the sales department selling goods?

A. Not selling goods, no.

Q. Outside of your experience with the other part of the company's operations, it is purely from an accounting view, is that correct?

A. That is correct.

[fol. 106] Chairman Ford: Is the same answer given by you with respect to the original franchise tax correction sheet for the business year 1936, would apply both with respect to what you included as Ohio business and as to the discrepancy between the amount of Ohio business first stated by Mr. Foley and the amount of Ohio business stated by Mr. Foley in what is now known as Appellee's Exhibit C? In other words, the same answers obtain in that year?

The Witness: No, sir; no, they do not because what we reported as Ohio business in 1936—I am looking now

at line 17, amount of Ohio business, $8,546,000, and in that year the International Harvester Company of America went out of the picture. All the sales were made in Ohio by the International Harvester Company itself through its own branches, so in that figure of $8,546,000 we have $7,951,000 of sales made by International Harvester Company branches to customers within Ohio, [fol. 107] plus works collateral sales at $595,000. That makes that $8,546,000. The other remarks that I made, Mr. Foley took his figures from the letter I sent him, the sales that my letter shows. It shows $34,756,000. Those were total sales of Springfield products, and from that figure was deducted in that assessment, in order to correct the duplication, the sales of Springfield product by Ohio branches. The first figure, including the Ohio branches, then is taken as the sales of Springfield product by Ohio branches, $1,708,000. That brings the figure down to $33,047,000. To that figure is added the figure that we reported in our return, $8,546,000.

Chairman Ford: The company reported for the business year 1936 not only motor trucks that were manufactured by the company over at Springfield but all kinds of goods and equipment that were sold by the company through its branch agencies here in Ohio?

The Witness: That is correct; that is—sold by its branches in Ohio to Ohio customers only.

Chairman Ford: As I understand it, going over to the corrected figure set out in Exhibit C, his figure as to the total amount of Ohio business, to wit, $41,594,703, that is the figure given by him?

The Witness: That is correct.

Chairman Ford: How much of that amount of business as represented by those figures was represented by motor trucks that were manufactured over at Springfield and sold that year everywhere?

The Witness: How much of that $41,594,703 sold everywhere?

Chairman Ford: Yes.

[fol. 107-A] The Witness: $34,756,000.

Chairman Ford: That represented motor trucks for that end of that fiscal year, which was October 31, 1936?

The Witness: That is right.

Chairman Ford: Represented the sale value of trucks manufactured at Springfield and sold in Ohio and everywhere else?

The Witness: Yes, sir.

Chairman Ford: How much of that figure that you have just given me, $34,756,000, how much of that figure was represented by the value of trucks manufactured at Springfield and sold in Ohio, delivered to branches and sold by Ohio branches.

The Witness: About $1,709,000.

Mr. Graham: That is approximately?

The Witness: $1,708,790 is what it shows on the record here.

Chairman Ford: The balance of that particular figure is represented by the value of trucks manufactured at the Springfield plant and sold to states and countries other than Ohio?

The Witness: Yes, that is correct.

Chairman Ford: And in that last figure with respect to the Springfield trucks sold or delivered to states and countries other than Ohio, such goods were shipped to whom?

The Witness: They were either shipped from the Springfield plant to the company's own warehouses located all over the United States or to the company's dealers in the United States or to the I. H. Company of America's branches that were operating only in the [fol. 108] state of Wisconsin at that particular time, or to the I. H. Company of Canada, Limited, a Canadian subsidiary, or to the I. H. Export Company which handles the export business.

Chairman Ford: This question, if there is any objection to it, will be taken subject to reservation and we will decide it later, and I want you to answer this only if you know; speaking with respect to the valuation of that part of the total Springfield truck business indicated by trucks sold and delivered by and/or delivered to states and countries other than Ohio, do you know how much of that figure as included and reported by Mr. Foley in this Exhibit C represented the amount and value of Springfield trucks that were shipped and delivered to the company's warehouses in these other states and sold from such warehouses?

The Witness: No, sir, I don't know the exact amount.

Chairman Ford: Do you know whether that was included or excluded from Mr. Foley's figures?

The Witness: I know it is included here because I have given Mr. Foley the total proceeds shown by the company—the total sales of motor trucks made by the company. Mr. Foley nowhere has made any deduction for goods sold from the warehouses outside the state of Ohio. He has included the total sales of the Springfield product.

Chairman Ford: Is there any breakdown in those figures with respect to this item?

The Witness: No, sir, we have no breakdown.

Chairman Ford: You can explain the answer.

[fol. 108-A] The Witness: The only way that we could get a figure like that would be to have every one of our branches all over the United States,—and during that period we had over one hundred,—they would have to examine every sales invoice that they have in their files for each one of these years to determine whether it went to a customer—to determine whether it was shipped from Springfield direct to the customer or from their own warehouse direct to the customer. That would all have to be tabulated and it would be a tremendous job for 100 branch houses to do, and the only other way to do it would be to do it on a percentage basis, find out what the percentage is of shipments going out from Springfield direct to dealers, and in order to do that you would have to examine the whole year of Springfield shipments.

Chairman Ford: Well, at any rate you did not give Mr. Foley a breakdown on that?

The Witness: No, sir, we didn't give him a breakdown.

Chairman Ford: And you don't have those figures in your own files?

The Witness: No, sir, they are not available because those invoices for 1936 have been destroyed long ago.

Chairman Ford: Are those figures available for any subsequent years?

The Witness: All we have for the year 1939 is a tabulation wherein there were about 56,000 invoices examined covering shipments for the year 1939, and it shows how many trucks were shipped out of Springfield to dealers and customers and how many were shipped to branch warehouses of the company itself. That is the only thing we have available.

[fol. 109] Chairman Ford: We will get to that in a minute. Now referring, Mr. Johns, to Mr. Foley's original franchise tax correction sheet, which is a part of the tax commissioner's transcript as filed by the Board of Tax Appeals, I notice that in line 17 against the item "Amount of Ohio business", Mr. Foley has noted as the amount of Ohio business reported by the company the sum of $11,654,962. Do you have those figures?

The Witness: That is for the year 1937?

Chairman Ford: The business year 1937.

The Witness: Yes, sir.

Chairman Ford: Or rather the fiscal year ending October 31, 1937.

The Witness: $11,654,000, I have it.

Chairman Ford: Has Mr. Foley correctly reported that item as the amount reported by the company?

The Witness: Yes, sir.

Chairman Ford: Can you tell us what was included in that item in the way of business of the company in Ohio?

The Witness: Yes, sir, it was $10,391,000 of sales by Ohio branches of the company to Ohio customers. There was an amount of $212,000 which represented sales of the Greenville, Ohio, and Van Wert, Ohio, retail stores which were operated by branch houses located outside the state of Ohio, but they were Ohio business, so they are in here, $212,000. In addition to that there is $1,051,000 of this general collateral sales business made by the Springfield works.

Mr. Graham: What do you mean by "collateral sales"?

The Witness: Castings and so forth. That brings up the total to $11,655,000 or 654,000.

[fol. 109-A] Chairman Ford: Now included in that total figure as reported by the company for the tax year 1938 I presume, but based upon the business of the fiscal year ending October 31, 1937, how much of that was represented by Springfield trucks, trucks manufactured at Springfield which were sold in Ohio?

The Witness: That figure would be comparable to the $1,708,790 which I gave you for 1936. The corresponding figure for 1937 was $1,967,693.

Chairman Ford: That represents Springfield trucks sold in Ohio?

The Witness: Yes, sir.

Chairman Ford: Sold to or through dealers in Ohio?

The Witness: Sold by the branches to dealers and customers in Ohio.

Chairman Ford: As I understand in that connection the dealer is in all instances an independent operator?

The Witness: Yes, sir.

Chairman Ford: He has no connection with the company?

The Witness: No, sir.

Chairman Ford: He is not an agent in any sense of the word?

The Witness: No, sir.

Chairman Ford: Against that same line or in that same line 17, the amount of Ohio business, I notice in this same correction sheet for the fiscal year 1937 the figure of $65,110,049. As against that I notice that in Appellee's Exhibit D, which is over the signature of Mr. J. W. Foley, that figure is given as $51,115,516. If you know you may state what were the facts and cir- [fol. 110] cumstances that accounted for that difference in the correction as made?

The Witness: The facts are similar to those given for the year 1936. Mr. Foley used the information set in my letter which is in evidence as Exhibit G, and he started out with the figure I gave there on the first page of that exhibit, $41,428,000, which was the total sales of Springfield product everywhere, and then the other remarks that I made about 1936 apply equally well to 1935. The amounts are a little different, but the ideas are the same, the same procedure.

Mr. Graham: That is also true of 1938 and 1939, isn't it?

The Witness: Yes, sir.

Chairman Ford: Included in this figure of $51,115,516, as set up by Mr. Foley, I assume, as in other years, was included the amount and value of the Springfield trucks that were sold in Ohio and elsewhere?

The Witness: That is right.

Chairman Ford: Of that figure how much of the total figure is represented by the amount and value of Springfield trucks delivered to points outside of Ohio?

The Witness: Delivered to points outside of Ohio? This is 1937?

Chairman Ford: The fiscal year 1937.

The Witness: That would be the difference between—that is $39,460,554.

Chairman Ford: And as in the previous year these deliveries were sent out on orders sent in to you by whom?

[fol. 110-A] The Witness: By the branch houses located all over the United States.

Chairman Ford: And they were sent out on orders made by the branch houses all over the United States—we are talking about other than Ohio now—and pursuant to those orders the trucks were delivered to whom and how?

The Witness: Some were delivered to dealers of the International Harvester Company; some were given direct to branch houses and some went through the International Harvester Export Company to be sold abroad; some went to the International Harvester Company of Canada, Limited, and some to the International Harvester Company of America, which was operating only in the state of Wisconsin.

Chairman Ford: What is meant by the term "warehouse" as used in connection with business such as done by the International Harvester Company?

The Witness: Well, we have what we call a warehouse here in Columbus. The warehouse, together with the organization who operates and the selling organization, constitutes what we call a branch house or a branch house organization. In this warehouse we store all kinds of implements and trucks in some of them, and large stocks of repair parts to service the surrounding community.

Chairman Ford: Does the company in all instances either own or rent the building and operate the warehouse, so-called?

The Witness: Yes, sir.

[fol. 111] Chairman Ford: It is not transacted by an independent person?

The Witness: No, sir, we have our own employees at all of these locations who are in charge of the company's business.

Chairman Ford: Is it anything more than a sales room, this warehouse you speak about?

The Witness: Oh, yes. We might stock several carloads of tractors in there or several carloads of binders or mowers or reapers or manure spreaders.

Chairman Ford: Are your products handled in any case by transfer agents under independent contracts?

The Witness: I don't know of any. It is not the prevailing practice. There may be an isolated case where we might have a transfer agent. I seem to recall that we did have one recently down in South Carolina, but I think that is out of the picture now. We didn't have a branch in South Carolina, so I believe we had a transfer agent there for a short period of time.

Chairman Ford: Well, I don't want to take up too much time. Yet we must have the facts in the record somehow. Referring to the tax commissioner's correction sheet for the fiscal year ending October 31, 1938, the tax year 1939, I note that in line 17 as an item of Ohio business Mr. Foley, the tax commissioner's representative, sent out the amount as reported by your company in the sum of $7,734,203.

The Witness: That is correct.

Chairman Ford: What does that include?

The Witness: That consists of sales to Ohio customers by Ohio branches of the company in the amount of [fol. 111-A] $7,103,000, and that includes sales of all products, motor trucks and everything else, plus retail sales made at our Van Wert and Greenville stores which are operated by branches outside the state of Ohio, in the amount of $119,000.

Chairman Ford: How much of that—

The Witness: And there is one more figure, some more of these works collateral, $512,000. That should make up the total of approximately $7,734,000.

Chairman Ford: How much of that figure is represented by the amount and value of Springfield trucks sold in Ohio?

The Witness: $1,360,474.

Chairman Ford: Going to the first correction sheet made by Mr. Foley, the agent of the tax commissioner, I note that the amount of Ohio business which he set up was $47,163,912, and that as against that in his second correction sheet, which is in evidence as Appellee's Exhibit E, he set out the amount of Ohio business as $38,251,671. Do you have that figure before you?

The Witness: Yes, sir.

Chairman Ford: What is the explanation with respect to the reduction in those figures made by Mr. Foley?

The Witness: The same explanation would apply as applied to the years 1937 and 1936.

Chairman Ford: Very well. Taking this figure $38,251,671 as Mr. Foley's statement of the amount of Ohio business for that fiscal year ending October 31, 1938, how much of that item is represented by Springfield trucks sold and delivered out of the state of Ohio?

The Witness: That is $30,517,468.

[fol. 112] Chairman Ford: Speaking with respect to those Springfield trucks sold or delivered outside of the state, to whom and how were they delivered and on whose orders, if any?

The Witness: They were delivered principally on orders of the branches for shipment to the branch house warehouses or to dealers of the company. In addition we still have those shipments going to the International Harvester Company of America, the International Harvester Company of Canada and the International Harvester Export Company. The International Harvester Company of America was operating only in the state of Wisconsin at that time.

Chairman Ford: During those years in which the International Harvester Company of America was operating as a sales representative, so to speak, of the manufacturing company in the state of Wisconsin, what was the modus operandi with respect to the delivery of Springfield trucks from the manufac' ring company to the International Harvester Company of America?

The Witness: The American company purchased those trucks f. o. b. the factory at Springfield.

Chairman Ford: Do you have any breakdown for these several years with respect to those sales that were made to the International Harvester Company of America, for the years 1936 on?

The Witness: Yes, those are separated. Those are available in Exhibit G.

Chairman Ford: Very well, and there are no figures for this year I am talking about with respect to the [fol. 112-A] amount and value of sales made outside of the state of Ohio from warehouses?

The Witness: No, sir.

Chairman Ford: Coming to first the fiscal year ending October 1, 1939, Mr. Foley, as the agent of the tax commissioner, in his first correction sheet stated that the

amount of Ohio business as reported by your company for the tax year 1940 was $8,125,736?

The Witness: Yes, sir.

Chairman Ford: Was that correctly reported as the amount of business done in Ohio for the fiscal year 1939?

The Witness: Yes, sir, that is what we reported.

Chairman Ford: That included what?

The Witness: $7,356,000 of that amount represented sales in Ohio by Ohio branch houses of the company, and that included of course all products as well as motor trucks. $50,000 represented sales made by the Van Wert retail store. $719,000 represented sales of works collateral, and the total $8,125,736.

Chairman Ford: Do you have a breakdown as to the amount and value of Springfield trucks in that item?

The Witness: The sales of Springfield trucks by Ohio branches amounted $1,858,184.

Chairman Ford: In his first correction sheet Mr. Foley set out the amount of Ohio business in the sum of $56,812,961, and as against that in the second correction sheet, which is in evidence as Appellee's Exhibit F, he set out the amount of Ohio business as $43,303,316. Do you have those figures?

The Witness: Yes, I see those figures.

[fol. 113] Chairman Ford: How is the difference in those figures accounted for?

The Witness: The same explanation applies to 1939 as applies to 1938, 1937 and 1936.

Chairman Ford: Very well. Now taking the corrected figure of Mr. Foley as the statement of the tax commissioner with respect to the company's Ohio business for the fiscal year ending October 31, 1939, to wit, $43,303,316, do you know what the different kind of transactions were that were included in that figure given by Mr. Foley?

The Witness: Yes, sir.

Chairman Ford: Well, if you know, state them.

The Witness: Mr. Foley started out by taking the total sales of the Springfield product, $37,035,764. Then he deducted from that the sale of Springfield product by Ohio branches of $1,858,184.

That left the sum of $35,177,580, to which he added the Ohio business as was reported at $8,125,736, giving the total Ohio business $43,303,316.

Chairman Ford: Included in that figure you state the amount and value of Springfield trucks which were delivered outside of Ohio?

The Witness: Yes, sir.

Chairman Ford: What is that figure?

The Witness: $35,177,580.

Chairman Ford: And as to the Springfield trucks which went out of Ohio, they were delivered on whose orders and they were delivered in what manner and to whom?

[fol. 113-A] The Witness: They were delivered on orders received from the company's branch houses located all over the United States to the company's warehouses or to the company's dealers or delivered to the International Harvester Company of America, operating only in Wisconsin, the International Harvester Company of Canada, Limited, or the International Export Company.

Chairman Ford: As to this year you say you do have something in the way of a breakdown as to the amount of the Springfield trucks that went to warehouses or some similar repositories?

The Witness: Yes, sir.

Mr. Lewis: I was going to identify that by a later witness.

Chairman Ford: Then amplifying this last question or explaining the last question and your answer thereto, do I understand the fact to be that there has been a compilation made covering the facts requested in that question, is that so?

The Witness: Yes, sir.

Chairman Ford: And those facts should be given by some other witness rather than yourself?

The Witness: Yes, for the reason that this compilation was made at our Springfield plant here in Ohio.

Chairman Ford: Very well, that is all I have.

By Mr. Graham:

Q. Mr. Johns, you testified on a question from Judge Ford with respect to deliveries made from your Springfield plant. Is it not true that on some occasions one of your dealers or branches has an order and he sends it in and you ship the thing or things to them for delivery?

A. One of our dealers?

[fol. 114] Q. One of your dealers or branches? Suppose you have a branch up in Minnesota that makes an order for a certain type of truck and sends the order in to you and you send it to him and he makes the delivery.

A. You mean the dealer makes the delivery?

Q. Yes.

A. You mean a customer in Minnesota?

Q. I will withdraw the question. Suppose your dealer or your branch office in Minnesota procured an order for one of your trucks manufactured at Springfield.

A. Yes, sir.

Q. And he would send the order in to you, how would you bill that order?

Chairman Ford: You mean at Chicago.

The Witness: You mean at Springfield?

By Mr. Graham:

Q. Yes.

A. The chances are the order would be filled by direct shipment to the dealer.

Q. Do you know of transactions of that kind where he gets an order and he sends it to the particular branch or particular office and then they send it down to Springfield for filling?

A. Yes, we have transactions like that too, but we have shipments that go direct to dealers, quite a lot worked out in the way you asked about in your question.

Chairman Ford: Do I understand in that case a dealer could deal directly with the company over here at Springfield and get a truck without the branch manager knowing anything about it?

The Witness: No. I understood the dealer sent the order to the branch but the branch forwarded it to Springfield and then Springfield shipped it to the dealer.

[fol. 114-A] Mr. Hance: Who do you bill for it?

The Witness: The dealer would be billed by the branch house.

Mr. Graham: That is all.

Redirect Examination

By Mr. Lewis:

Q. I am not sure I understood you. Did I understand Mr. Graham to ask you if the dealer in Wisconsin sent

an order for a truck—I thought he said to the general office in Chicago——

A. He didn't mean that.

Mr. Graham: It doesn't make any difference where it went.

The Witness: The dealer sends that order to the branch house. The branch house sends it to the Springfield plant and the Springfield plant ships it direct to the dealer and the branch house in Minnesota bills the dealer and collects the money.

By Mr. Lewis:

Q. I think in answer to a question by Mr. Ford or Judge Ford, you referred to the sales by International Harvester Company in 1934 and 1935. I think I might explain to the board—I think there was some question about the sale of agricultural implements in those years. Explain to the board who made the sales of the agricultural implements in 1934 and 1935.

A. The International Harvester Company of America was operating in the state of Ohio in 1934 and 1935, and it reported in its franchise tax return all of the sales, not only——

Mr. Graham: I object and move to strike the answer from the record, what is reported in its return.

[fol. 115] Chairman Ford: We will assume that it complied with the law.

By Mr. Lewis:

Q. Mr. Johns, have you got a list of the states in which International Harvester Company in 1939 filed income tax returns and paid income taxes for the year 1939?

Mr. Graham: I object to the question.

Mr. Lewis: We withdrew two exhibits and then I asked some questions of Mr. Johns on direct examination. We have a right to show how many states we filed income tax returns in and paid income taxes in. We have got in evidence what states we paid franchise taxes in.

Chairman Ford: Well, as one member of this board, I don't think that evidence is competent. I don't know what the other members of the board think, but I think the safe thing to do is to take that under reservation and get along here.

Mr. Graham: It will go in subject to my objection, will it?

Chairman Ford: Yes, subject to the objection and ruling on the question. Ruling on the question is reserved.

The Witness: Did your question specify the year?

Mr. Lewis: I asked for 1939.

The Witness: The states of Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Wisconsin and the District of Columbia.

[fol. 115-A] Q. From your knowledge and experience in handling the income tax returns of International Harvester Company in these years, does the same situation apply to 1936, 1937 and 1938, the same state?

A. Does the same situation apply to what year?

Q. Would the answer as to 1939 be true as to 1936, 1937 and 1938?

A. Generally speaking, yes.

Chairman Ford: Let that question go in subject to the same objection.

Mr. Graham: I understood my objection was to all of this line of questioning.

Chairman Ford: That is right: You may proceed, Mr. Lewis.

A. L. Vierling, called on behalf of the appellant, being first duly sworn, testified as follows:

Examined by Mr. Lewis:

Q. Will you state your name and the position you hold with the International Harvester Company and briefly your duties?

A. A. L. Vierling. I am the works auditor and have been in that position for approximately eight and a half years and with the company thirty-three years.

Chairman Ford: What kind of an auditor?

The Witness: Works auditor. That goes along with the Springfield Works. I am in charge of all matters in connection with the timekeeping and payroll and paying of wages, employees, the approving of all invoices for goods purchased, the compilation of material, labor and overhead [fol. 116] costs of the product we make, in charge of shipping records, in charge of the annual inventory both as to the physical count and the valuation.

By Mr. Lewis:

Q. Have you made an investigation of the shipments of Springfield motor trucks in 1939 showing the number of those shipments that went direct to branches of International Harvester Company and the number of those shipments that went direct to dealers of International Harvester Company?

A. We compiled such a statement.

Mr. Lewis: I ask that this paper be marked for identification as Appellant's Exhibit No. 5.

And thereupon the document above referred to was marked for purposes of identification herein as Appellant's Exhibit No. 5.

By Mr. Lewis:

Q. I hand you a paper which has been marked for identification as Appellant's Exhibit No. 5, and I will ask you to tell the court what that exhibit is (handing paper to witness).

A. This exhibit was compiled under my supervision, and in order to compile the sheet it was necessary for us to examine approximately 58,000 property invoices issued to our branch houses, and this to determine how many of our motor trucks were shipped to dealers and customers from the plant and how many were shipped to the branch houses of the International Harvester Company.

Q. This covers what year?

A. The year 1939, the fiscal year of 1939.

Q. How many invoices had to be examined?

A. Approximately 58,000.

Q. How many working hours would that mean of clerical——

[fol. 116-A] Mr. Graham: I object to that.

Chairman Ford: The objection is sustained.

Mr. Lewis: I think it is pertinent to show whether this Rule No. 275 is adapted to modern business, whether it is a reasonable rule.

Chairman Ford: Go ahead. I don't believe this question is particularly material.

Mr. Lewis: I will withdraw the question.

Chairman Ford: Very well.

By Mr. Lewis:

Q. Have you got the invoices for the years 1938, 1937 and 1936 from which a similar compilation could be made?

A. They have been destroyed.

Q. When were they destroyed?

A. I can't answer that question with any sure knowledge. We have a system in our plant that records are kept, various records, for various lengths of years, and I am sure that these records are not kept for any such length of time as ten years, but I can't answer the question as to just — year each year was destroyed.

Q. From your experience as works auditor of International Harvester Company at the Springfield Works, in your opinion would the situation be generally approximately the same for the years 1936, 1937 and 1938, as this exhibit shows?

Mr. Graham: I object.

Mr. Lewis: We offer the exhibit in evidence.

Mr. Graham: I object to the introduction of it.

Chairman Ford: On what ground?

Mr. Graham: What materiality does it have? What difference does it make? You have got here a bunch of figures that he says were shipped direct to the cus- [fol. 117] tomer. He ships some to the branch warehouses of International Harvester Company. For what purpose? If they are to be taken there to be stored and sold afterwards, that is one thing, and if they were not shipped in that manner, that is another thing. The witness testified that they shipped some of them on an order which was sent in to one of these branches, and he testified that they were sent—if I lived in Minnesota and wanted to get certain type of truck I could place my order and send it to the branch warehouse and the branch warehouse would send it to the Springfield plant and they would make the

delivery. It isn't broken down sufficiently to be of any value.

Mr. Lewis: Rule No. 275 states: "In the case of manufacturing companies, all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state."

On this point we are not admitting the rule at all. We are trying to apply the rule. We have an exhibit that shows for the year 1939, 62% of the Springfield trucks shipped out went to warehouses of the company all over the United States. They are bound to be sold from the warehouse floor, and 37% were shipped direct to dealers and customers and are bound not to be sold from the warehouse floor. If they went to the warehouses they could not be sold except from the warehouse floor.

Chairman Ford: Is there any breakdown in this exhibit with respect to the number of trucks that were shipped to warehouses in Ohio and those shipped to warehouses outside of Ohio?

[fol. 117-A] The Witness: No breakdown has been made. No breakdown can be made.

Chairman Ford: In my mind the most serious question presented here is the question of competency. There is no question but what this man, as a competent party, could go through these records that he speaks about and make the compilation which is presented here for the benefit of the court, of a court or of a tribunal with quasi-judicial powers, but I don't understand how the attorney for the appellee could cross examine this man without having those records available.

Mr. Lewis: Well, with 60,000 invoices to examine—it has been a well-established rule that where there are voluminous records, too voluminous to bring into court, that a competent witness can make a compilation and testify to it.

Mr. Graham: So far as the records are made available in the court room to cross examine from.

Chairman Ford: Let us see how that rule in Ohio goes. That rule is well recognized in Ohio. We are doing it every day, having witnesses make a compilation of this kind for the benefit of this tribunal, but in all those cases we have had here, as far as I know, the records have been

available for the board or counsel on the other side or for counsel for the appellant.

The general rule is stated in Ohio about like this: "It is a generally accepted rule that where books, records and papers which might properly be used in evidence are numerous or voluminous, it is competent for any qualified person who has examined them to testify as [fol. 118] to the result of his examination—give a general summary thereof. The existence of such a rule is recognized by the Ohio Supreme Court in a decision dealing with the admissibility in evidence of the contents of an account which was beyond the jurisdiction of the court.

"In the absence of some special reason, the testimony of private auditors and of accountants is inadmissible to show the contents of original accounts or books. Such evidence may, of course, be the best evidence which can be produced of lost or destroyed books and accounts, and admissible as such. And the general rule is that in the sound discretion of the court, where books and documents of account are numerous and voluminous, the testimony of a competent expert accountant as to the result of his examination of the books is admissible, though in such case the books and documents must either be first offered in evidence, or be in the custody of the court so that the opposite party may have the opportunity, by examining the originals, to verify the correctness of the abstract and schedules thereof, offered against him. Thus, the record or the abstract of books of account which contain more than 100,000 entries, made by duly qualified public accountants, is admissible where the books themselves are in evidence as exhibits. If it does not appear, however, that the objecting party made any effort to secure the missing books, that he had any desire to examine them, or that they were not actually in the custody of the court, such testimony may pe proper."

That quotation is found in Ohio Jurisprudence, Volume 17 under the topic of evidence, Sections 196 and 197. This exhibit will be accepted, subject to your objection [fol. 118-A] and reservation, and the board will reserve ruling on the admission of Appellant's Exhibit No. 5.

By Mr. Lewis:

Q. Has the company any warehouse in Springfield aside from the branch warehouse?

A. No, sir.

Q. In other words, when a truck is completed by the factory what happens to it?

A. It is turned over either to a drive-away company or turned over to the railroad company in cars.

Q. And the warehouse of the branch is solely for the goods of that branch—the branch here at Columbus?

A. Yes, sir, that is right, it is what is called a motor truck sub-branch.

Q. Does the Springfield Works have any salesmen it sends out to solicit orders?

A. No, sir.

Q. What happens if you should get an order, if an order should come in to the Springfield Works, what do you do with it?

A. We would accept no orders other than branch houses or through our Chicago office.

Q. If you got an order from a dealer what would you do with it?

A. We would first determine in what branch that was located and return it to that branch.

Mr. Lewis: May it please the board, I should like to have this paper marked for identification as Appellant's Exhibit No. 6.

Chairman Ford: Very well.

And thereupon the document above referred to was marked for purposes of identification herein as Appellant's Exhibit No. 6.

By Mr. Lewis:

Q. I will hand you this paper marked for purposes of [fol. 119] identification as Appellant's Exhibit No. 6, and I will ask you to tell the court what that is (handing paper to witness).

A. This represents the cost of the trucks and collateral parts produced at the Springfield Works for the years 1934 to 1939 inclusive, and it likewise shows the cost of producing coiled springs at what is known as our Springfield Wire & Spring Company for the same years.

Q. For the years 1934 to 1939 inclusive?

A. Yes, sir.

Q. The first column shows the labor at the Springfield Works?

A. Labor at the Springfield Works, including the so-called labor and burden.

Q. And the second column shows the parts received from other International Harvester Company works?

A. Yes, sir.

Q. And the third column shows the parts and materials purchased from outside sources?

A. Yes, sir.

Q. And the fourth column shows the total cost of production?

A. Yes, sir.

Q. And at the bottom it shows the cost of production for springs at the Springfield Spring Works from 1934 to 1939?

A. The first column shows the same as the (a) under the "works" and it shows the direct labor and the labor and burden.

Q. And the next column?

A. The cost of materials, the third being the sum of the two.

Q. The cost of purchased material?

A. Yes, sir.

Q. Is this compilation taken from the records of the company?

A. Yes, sir.

Q. And you believe that to be correct, do you?

A. Yes, sir.

[fol. 119-A] Mr. Lewis: We offer Appellant's Exhibit No. 6 in evidence.

Mr. Graham: We object. That question has been passed upon by the Supreme Court in the Aluminum Company case in the sixth branch of the syllabus. The court there states: "In computing the numerator of the 'business done' fraction under Section 5498, General Code, the tax commissioner may not be required to deduct therefrom (a) goods sold in interstate commerce, (b) raw materials shipped from outside of the state, whether partially fabricated or not, (c) the cost of selling goods manufactured in Ohio but sold outside of Ohio, or (d) administrative expense attributable to sales made outside of Ohio of goods manufactured in Ohio."

This is seeking to do directly what the Supreme Court said he wasn't required to do.

Chairman Ford: I don't believe this is competent or material. The order of the board will be that we will sustain the objection to this exhibit as evidence, but it may be put in the record as a proffer.

Mr. Lewis: May I have an exception to that?

Chairman Ford: Yes, you may.

Mr. Lewis: I have nothing more except a stipulation which we agreed upon before this session began. It is stipulated by the parties, subject to the objection of the appellee as to its relevancy and materiality, that in 1934 and 1935 all motor trucks sold by International Harvester Company to International Harvester Company of America in the Springfield Works were sold delivered f. o. b. factory, and they were delivered either by rail [fol. 120] shipment or drive-away common carrier shipment, and in the bills of lading the consignor was the International Harvester Company and the consignee was the International Harvester Company of America.

Mr. Graham: That is correct, subject to my objection as to relevancy.

Chairman Ford: Mr. Vierling, you are a manufacturing company accountant?

The Witness: That is correct.

Chairman Ford: When a truck, whether in the year 1934 or any subsequent year up to and including the year 1939, a finished truck, left your plant, was there, as between the factory, your plant and the company, any record of the sales value of that truck as it went out of your plant?

The Witness: There was not. The plant issues what is known as a property invoice, each truck by the name or by models or by the wheelbase, the cab or body equipment, it gave a code number to it and we render our property invoice to the branch house only by a code number and description. No dollars or cents are shown on the invoice. We are not interested in dollars and cents in the plant. We have nothing to do with dollars and cents in the plant.

Chairman Ford: Suppose a branch manager in Mankato, Minnesota, sent in an order to the Springfield Works for one truck or half a dozen trucks and those trucks were shipped either to the branch manager or to some dealer pursuant to his direction, what in the way of an invoice would you have to send out with these trucks? [fol. 120-A] The Witness: Repeating again the same tes-

timony, we issue a property invoice to the branch house under whose jurisdiction that dealer was. The plant issues no property invoices to other than branch houses. Neither do we accept shipping orders from other than branch houses.

Chairman Ford: What was on your invoices?

The Witness: By way of explanation, the branch houses send to us what is called a shipping order. It calls for one truck or half a dozen trucks, showing the model, the wheelbase, the color of the paint, the type of wheel equipment, whether single or dual rear, kind and size of tires, if it takes a cab and an open up body or a cab and a dump body, and that is our shipping order from the branch house to our assembly line. If that order shows delivery direct to the branch house, after the truck is completed we turn it over either to a drive-away company or the railroad company for shipment direct to the branch.

If that shipping order shows a delivery to a dealer, we send it to the dealer, but render the invoice, the property invoice, to the branch house.

Chairman Ford: Is there anything on that invoice that you render to the branch manager which shows how much that truck sells for?

The Witness: No, sir. The invoice is a property invoice. It shows the number of the units shipped. We might ship one truck by a certain code, say Code K-1 chassis, with a certain wheelbase, and it could have another code number which would call for a pickup, but [fol. 121] there is no dollar and cents transaction between the manufacturing plant and the branch house. That is taken care of by the general sales department. We issue these property invoices in four copies, to the branch house, one copy to the Chicago office and two copies for works use, but again no dollar and cent invoice is shown. It is just a description in order for the Chicago office to have the proper record.

Chairman Ford: You may or may not know the answer to this question. Who in the first instance fixes the price at which that truck you are talking about should sell for?

The Witness: If you were to come to a dealer as an individual to buy a truck and the dealer would have the company's published list price of anything he might desire and the type of the truck, the kind of equipment I have

just mentioned, the salesman would know what the total cost was to the individual for the truck.

Chairman Ford: But who fixes it in the first place?

The Witness: The Chicago sales department. The Chicago office establishes the sales price of motor trucks.

By Mr. Lewis:

Q. What parts for a Springfield motor truck do you make in the Springfield Works and what parts are either purchased from outside suppliers or are parts received from the other works of the Harvester Company?

Mr. Graham: I object.

Chairman Ford: Following our ruling, we will sustain the objection. If you want to make a proffer of what you expect the witness to say, you can put that in.

[fol. 122] Mr. Lewis: We offer to prove that the Springfield Works manufactures engine shield, radiator front, mud shields, running board and running board shields, cab parts, panel body fronts, rear door panels and numerous small standings, pickup body, side, front and rear panel, and numerous small parts, some of the rear fenders, and at times a small portion of the front fender requirements, and that the balance of parts and materials going into the Springfield trucks are either purchased or received from the other plants of International Harvester Company or purchased from outside suppliers.

That is all we have. We rest.

Mr. Graham: We rely upon the record and what has been introduced on cross examination.

And thereupon the appellant rested.

And thereupon the appellee rested.

And the foregoing was all of the evidence offered, introduced and admitted on behalf of the appellant and on behalf of the appellee on this hearing of this cause.

[fol. 122-A] APPELLANT'S EXHIBIT 2.

International Harvester Company.
Branches and Selling Locations in United States in the Years 1936-1939 Inclusive.

Admitted to do business in all states except Nevada.

Branch Houses located in:

Alabama	Maryland	Oregon
Arkansas	Massachusetts	Pennsylvania
California	Michigan	South Dakota
Colorado	Minnesota	Tennessee
Florida	Missouri	Texas
Georgia	Montana	Utah
Illinois	Nebraska	Virginia
Indiana	New York	Washington
Iowa	North Carolina	West Virginia
Kansas	North Dakota	Wisconsin
Kentucky	Ohio	Wyoming
Louisiana	Oklahoma	(35 states)

In the following states and the District of Columbia where there were no branch houses, there were McCormick-Deering retail stores or motor truck sub-stations:

Connecticut	New Jersey
Delaware	Rhode Island
Maine	Vermont
Mississippi (since Apr. 1938)	District of Columbia
Idaho	(8 states and District of Columbia)

No Selling locations in:

Arizona	New Mexico
Nevada	South Carolina
New Hampshire	(5 states)

[fol. 123] APPELLANT'S EXHIBIT 5.

Shipments of Motor Truck Chassis

from

International Harvester Company,
Springfield Works, Springfield, Ohio,
for Period
November 1, 1938 to October 31, 1939.

Month	Year	Shipped to Dealers and Customers	Shipped to Branch Warehouses of International Harvester Company	Total
November	1938	990	1925	2915
December	1938	1678	2370	4048
January	1939	1895	2817	4712
February	1939	1827	3036	4863
March	1939	2450	4429	6879
April	1939	1594	3824	5418
May	1939	1622	3552	5174
June	1939	1947	3120	5067
July	1939	1751	2332	4083
August	1939	2425	2671	5096
September	1939	1603	2458	4061
October	1939	1528	2672	4200
Totals		21310	35206	56516
		37.7%	62.3%	100%

[fol. 123-A] APPELLANT'S EXHIBIT 6.

International Harvester Company.

Analysis of Springfield Works.

Total Cost of Production—Years 1934 to 1939 Inclusive.

		Springfield Labor (a)	Parts Received from other I. H. Co. Works (b)	Parts and Materials Purchased from Outside Sources (c)	Total Cost of Production (d)
1934	Amount	$2,797,926.45	$5,579,364.30	$8,703,315.01	$17,080,605.76
	Percent	16.38	32.67	50.95	100.00
1935	Amount	4,721,281.98	6,621,173.61	16,817,668.48	28,160,124.07
	Percent	16.77	23.51	59.72	100.00
1936	Amount	5,976,392.42	9,941,726.25	21,576,016.46	37,494,135.13
	Percent	15.94	26.52	57.54	100.00
1937	Amount	8,195,823.48	13,919,402.18	25,825,235.03	47,940,460.69
	Percent	17.10	29.03	53.87	100.00
1938	Amount	5,305,733.46	8,861,061.43	20,460,317.70	34,627,112.59
	Percent	15.32	25.59	59.09	100.00
1939	Amount	4,392,632.29	11,931,667.33	21,510,949.24	37,835,248.86
	Percent	11.61	31.54	56.85	100.00

[fol. 124] (The above figures do not include the Springfield Works.)

(a) Springfield Labor. This consists of Springfield Works productive labor and burden labor.

(b) Interworks Receipts. This is interworks collateral parts and assemblies and also truck engines received from other International Harvester Company works, all of which are located outside of the state of Ohio.

(c) Outside Purchases. This is the balance of the cost of production. It includes raw materials such as sheet steel, on which Springfield Works performs fabricating operations, as well as finished purchased units which Springfield Works merely assembles into complete chassis. Breakdown as to purchases within and without the state of Ohio is not available.

The cost of production for springs at the Springfield Spring Works in the years 1934 to 1939 was as follows:

	Springfield Spring Works Labor	Cost of Purchased Material	Total
1934	$116,417.41	$105,055.14	$221,472.55
1935	201,502.57	196,737.72	398,240.29
1936	296,406.33	282,389.03	578,795.36
1937	426,563.02	417,882.88	844,445.90
1938	265,783.14	265,347.19	531,130.33
1939	187,333.21	217,120.90	404,454.11

[fol. 124-A] BEFORE BOARD OF TAX APPEALS OF OHIO

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto that the statements hereinafter set forth may be considered as true and proven if relevant and material, the same as though proven by competent evidence, reserving, however, to each party the right to object to any stipulation herein contained on the grounds of relevancy and competency and also reserving to each party the right to introduce such further competent evidence as it may deem desirable.

1. International Harvester Company in and during the years 1934 to 1939, both inclusive, was a corporation organized under the laws of New Jersey. Its general business and accounting office was located in the city of Chicago, Illinois. Its business consisted of the manufacture of agricultural implements, tractors, motor trucks, binder twine and similar commodities and parts thereof, and the sale of such products so manufactured. During the years 1934 to 1939 inclusive it operated several factories in Chicago, Illinois, as well as factories in Auburn, New York; Milwaukee, Wisconsin; Chattanooga, Tennessee; Canton, Rock Falls, Rock Island and East Moline, Illinois; New Orleans, Louisiana; two factories in Springfield, Ohio; Fort Wayne and Richmond, Indiana; and (for part of said period) a factory at Indianapolis, Indiana, and a factory at Huntington Park, California (for part of said period).

(To which stipulation the tax commissioner objects on the grounds of relevancy and competency.)

[fol. 125] 2. (a) During the years 1934 and 1935 all the goods manufactured or handled by the International Harvester Company which were sold to the public in the United States were distributed by International Harvester Company of America, which purchased the goods from the International Harvester Company. During the years 1936 to 1939 inclusive, however, the International Harvester Company operated directly the selling branches in the United States formerly operated by International Harvester Company of America (except in Wisconsin), and sold to dealers and users in the United States, except in Wisconsin, the goods which it manufactured and handled.

International Harvester Company of America continued to handle the Wisconsin business. During the entire period 1934 to 1939 inclusive, International Harvester Company sold its goods to the International Harvester Export Company which sold said goods for the foreign trade to foreign subsidiaries of the International Harvester Company and to jobbers in foreign countries, and to the International Harvester Company of Canada Limited which sold the goods to the public in the Dominion of Canada. International Harvester Company in 1934 and 1935, as well as in the years 1936 to 1939 inclusive, sold a small amount of works collaterals and repair parts direct to the public.

(b) All the capital stock of said International Harvester Company of America, International Harvester Export Company and International Harvester Company of Canada Limited was owned, directly or indirectly, by the International Harvester Company.

[fol. 125-A] (c) International Harvester Company of America had in 1934 and 1935, and International Harvester Company had in the years 1936 to 1939 inclusive more than 100 selling branches in the United States, selling agricultural implements and machines, tractors, motor trucks and kindred lines and repairs thereof and binder twine to dealers and users; also a number of retail stores known as McCormick-Deering Stores, selling at retail to the public; and also a number of retail motor truck sub-stations selling motor trucks at retail to the public, and occasionally selling, at wholesale, motor trucks to dealers. These McCormick-Deering Stores and motor truck sub-stations were each of them under the supervision of the branch house in whose territory it was located.

(d) The branches of the International Harvester Company of America in the state of Ohio in 1934 and 1935, and of said International Harvester Company in 1936 to 1939 inclusive were located at Columbus, Cincinnati, Toledo and Cleveland. The McCormick-Deering Stores in Ohio of the same companies and in the same periods were located at Greenville, Van Wert, Ashland, Bellevue, Canton, Findlay, Marion, Troy, Wooster, Hamilton and Portsmouth. The motor truck sub-stations in the state of Ohio of the same companies in the same period were located at Akron, Springfield and Youngstown.

(To which stipulation the tax commissioner objects on the grounds of relevancy and competency.)

[fol. 126] 3. During the years 1934 and 1935 International Harvester Company sold to International Harvester Company of America the requirements of the latter company for its business in the United States, and the goods were shipped f. o. b. the factories of International Harvester Company on orders sent from the branches of International Harvester Company of America.

In 1936 and later years the branches of International Harvester Company sent shipping orders to the factories to ship goods to the various branches for storage in warehouses at the branches until the branches could sell them to or ship the goods direct to the dealers, and in a very small percentage of cases to ship direct to the users.

(To which stipulation the tax commissioner objects on the grounds of relevancy and competency.)

4. In the years 1934 to 1939 inclusive the goods sold by International Harvester Company to International Harvester Company of Canada Limited and to International Harvester Export Company were sold pursuant to arrangements made by representatives of the International Harvester Company with representatives of International Harvester Company of Canada Limited and International Harvester Export Company located in Chicago, Illinois.

The goods manufactured at the Springfield Works and sold to said International Harvester Company of Canada Limited and International Harvester Export Company were [fol. 126-A] shipped f. o. b. the factory at Springfield, Ohio, to the International Harvester Company of Canada Limited to sell to the public in the Dominion of Canada, and the goods sold to the International Harvester Export Company were shipped to jobbers in foreign countries and to foreign subsidiaries of said International Harvester Company.

(To which stipulation the tax commissioner objects on the grounds of relevancy and competency.)

5. The factories made a small amount of sales of castings and repair parts on orders taken and approved by the factories. On all other sales of agricultural implements and machines, motor trucks, tractors and kindred

lines to dealers and users, the orders were solicited by representatives of the selling branch in whose territory the buyer was located, or the order was received by mail by the selling branch and was not valid until approved by the selling branch.

Each year the selling branch enters into an annual contract with each dealer by which the dealer makes an initial order of goods and estimates the balance of his requirements of the company's goods for the ensuing year, and from time to time orders said goods from the branch. If any order should be received by a factory from a purchaser, unless it were for castings and repair parts, the order would be transmitted by the factory to the branch in whose territory the purchaser was located.

All sales proceeds, both of cash and of notes, are received by the selling branches and any notes received [fol. 127] as part payment are held at the selling branches and interest and principal collected there.

Except for castings and repair parts above referred to, which are sold direct by the factories, the function of the factory is limited to the manufacture of the goods and then to the shipping of them when manufactured to the selling branches or to foreign subsidiaries, or direct to the purchasers on orders received from the branches in the case of sales in the United States or from the general office in Chicago in the case of sales to foreign subsidiaries or to jobbers in foreign countries.

6. On the sale of goods by a branch, the branch either delivered the article from its own stock in its warehouse at the branch house, or directed that the goods be shipped by the factory direct either to the dealer or, in a very small percentage of cases, to the user.

7. The selling branches made no sales of agricultural implements or machines at retail to the public, except a small amount of retail sales in places where the company had no dealer representation. The company's own branches, however, sold repair parts and motor trucks at retail to the public.

8. (a) International Harvester Company had in 1934 to 1939 two factories in Ohio, both located at Springfield, known as the Springfield Works and the Springfield Spring

Works. The Springfield Works produces motor trucks. The Springfield Spring Works manufactured coiled springs for agricultural machines. The springs were shipped to factories of the International Harvester Company in other [fol. 127-A] states for incorporation by those factories in agricultural machines. The Springfield Spring Works was discontinued at the end of 1939.

(b) A considerable part of the material and appliances used in the assembly of motor trucks at the Springfield Works is manufactured by the company outside of Ohio and is shipped to the Springfield Works for assembly into motor trucks. A considerable part is purchased from other suppliers both in Ohio and outside of Ohio, and is shipped to the Springfield Works for assembly. In the years 1934 to 1938 inclusive the Springfield Works had a foundry manufacturing malleable castings, part of which was shipped to the Fort Wayne motor truck plant of the International Harvester Company at Fort Wayne, Indiana, and the rest used in the assembly of motor trucks at Springfield Works. The foundry was discontinued at the end of 1938. The Springfield Works made cabs and fenders and some bodies from sheet metal purchased from mills both inside and outside of Ohio. Motors, frames, axles, transmissions, wheels, rims, tires, tubes, brakes and head lamps were either shipped to the Springfield Works from plants of the company outside of Ohio, or were purchased from other manufacturers within or without Ohio.

9. Delivery of motor trucks from the Springfield factory was made partly by rail shipment from the factory to the branch or to the dealer's town, but chiefly by driveaway by a driveaway company from the factory to the branch or to the dealer, or by driveaway by the dealer taking delivery himself at the factory. In a very small proportion of cases, probably less than 1%, ship- [fol. 128] ment was made from the factory direct to the user, or delivery was made to the user at the factory who drove his own truck away.

(To which stipulation the tax commissioner objects on the grounds of competency and relevancy.)

10. The sales by International Harvester Company to International Harvester Company of America in 1934 and 1935 of Springfield Works' products, shipped or delivered to the Ohio branches of International Harvester Company of America were as follows:

1934	$632,936.36
1935	982,202.80

The sales by the Ohio branches of the International Harvester Company of Springfield Works' products in 1936 to 1939 inclusive were as follows:

1936	$1,708,790.00
1937	1,967,693.00
1938	1,360,454.00
1939	1,858,184.00

11. Below is given a table showing in Column A the total sales by Ohio branches to Ohio buyers; in Column B the sales by Ohio branches to Ohio buyers which were of Ohio manufacture, namely the Springfield Works motor trucks; and in Column C the sales by Ohio branches to Ohio buyers of goods manufactured outside Ohio.

[fol. 128-A]

	A Sales by Ohio Branches to Ohio Buyers	B Sales by Ohio Branches to Ohio Buyers of Goods of Ohio manufacture, namely Springfield Works motor trucks	C Sales by Ohio Branches to Ohio Buyers of goods manufactured outside Ohio
1936	$7,951,470.80	$1,708,790.00	$6,242,680.80
1937	10,603,519.82	1,967,693.00	8,635,826.82
1938	7,222,372.72	1,360,454.00	5,861,918.72
1939	7,406,063.83	1,858,184.00	5,547,879.83

12. On its Ohio franchise tax returns for the years 1935 to 1940 inclusive, reporting sales for the year previous in each case, the company reported Ohio business as follows:

Ohio Return	Based on figures of	Total Sales in Ohio per Return
1935	1934	$ 885,459.12*
1936	1935	1,531,876.34*
1937	1936	8,546,996.27
1938	1937	11,654,962.12
1939	1938	7,734,202.57
1940	1939	8,125,736.23

13. It is agreed that the figures set out in the following table show for the years 1934 to 1939 the correct amount of property in the state of Ohio, correct amount of the [fol. 129] total property of the company, and the correct percentage of the company's Ohio property to total property.

Year	Ohio Property	Total Property	Percentage in Ohio
1934	$ 7,367,100	$338,666,107	2.1753%
1935	8,119,415	365,556,800	2.2211
1936	8,679,108	398,978,944	2.1730
1937	15,267,228	427,726,061	3.5694
1938	9,613,593	401,966,829	2.3916
1939	9,775,868	396,515,798	2.4654

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* Shipments at sales prices from Springfield Works to Ohio branches of International Harvester Company of America are included here in the following amounts:

1934	$632,936.36
1935	982,202.80

Note: In 1936 the company changed its annual accounting period from a calendar year to a fiscal year ending October 31. In the above table the years 1934 and 1935 are calendar years. 1936 is a 10-month period—January 1 to October 31. The years 1937, 1938 and 1939 are fiscal years beginning November 1 and ending October 31.

It is also agreed that the total business of the company during this same period was as follows:

1934	$ 97,592,280
1935	133,703,278
1936	216,377,171
1937	303,394,978
1938	222,261,604
1939	213,001,465

It is further agreed that the total net worth of the company which shall be subject to the Ohio allocation percentage is for the years 1934 to 1939 as follows:

1934	$322,067,677
1935	338,224,220
1936	362,058,346
1937	373,603,141
1938	375,822,837
1939	368,784,979

14. In his computation, the tax commissioner has found the figure of business done in Ohio to be the amount of the sales proceeds of all goods manufactured [fol. 129-A] by the company in Ohio, plus the amount of the sales proceeds received by Ohio branches from the sale of general line goods, that is, agricultural implements and machinery, tractors, stationary engines, and parts sold by the Ohio branches to Ohio dealers and users. These general line goods were all manufactured by the company outside Ohio.

15. The total amount of inventories of motor trucks and attachments therefor, valued at cost or market whichever is lower, on hand at the various branch house warehouses of the company located all over the United States at the close of business October 31, 1936, 1937, 1938 and 1939, together with the estimated portion representing the product of the Springfield, Ohio, plant, was as follows:

	Total	Estimated Percentage Springfield	Springfield Product
October 31, 1936	$8,800,965.95	55.455%	$4,880,575.67
October 31, 1937	10,356,383.74	55.03%	5,699,117.97
October 31, 1938	8,166,739.10	58.89%	4,809,392.66
October 31, 1939	9,431,696.90	56.87%	5,363,806.03

16. Rule No. 275, adopted October 13, 1939, by the tax commissioner of the state of Ohio, is as follows:

"Rule No. 275. Business done in and out of Ohio. —Business done in and out of Ohio by a corporation subject to the payment of franchise taxes shall be determined under Section 5498, General Code, by allocating to the business fraction therein provided sales in and out of Ohio.

[fol. 130] All sales of goods from warehouses in Ohio, wherever manufactured, shall be considered as Ohio sales.

In the case of manufacturing companies, all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state.

The denominator of such business fraction shall in all cases be the total sales wherever made."

Signed this thirtieth day of November, 1943.

Edward R. Lewis,
Attorney for Appellant.
Thomas J. Herbert,
Attorney General,
Attorney for Tax Commissioner.
Perry L. Graham,
Assistant Attorney General.

The parties further stipulate, subject to the reservation by appellee of the right to object to the contents of this stipulation on the ground of its relevancy and materiality, as follows:

1. In 1934 and 1935 the contract between International Harvester Company and International Harvester Company of America, under which said International Harvester Company sold motor trucks and attachments and parts therefor to said International Harvester Company of America, provided that the articles sold under said contract should be delivered by said International Har-

[fols. 131-136] vester Company to said International Harvester Company of America f. o. b. factory.

2. The articles sold under said contract were delivered in one of the following three ways:

(a) By shipment by rail or driveaway common carrier f. o. b. factory to branches of International Harvester Company of America all over the United States, on bills of lading with International Harvester Company as consignor and International Harvester Company of America as consignee.

(b) By shipment by rail or driveaway common carrier direct to dealers of International Harvester Company of America all over the United States, on bills of lading with International Harvester Company as consignor and the dealer in each case as consignee.

(c) By the dealer or his representative calling personally at the factory and taking delivery of his own truck, attachments or parts, and transporting them himself to the dealer's town.

O. K. Edward R. Lewis, Attorney for Appellant.

[fol. 137] BEFORE BOARD OF TAX APPEALS OF OHIO

DECISION—Entered February 14, 1945

This cause and matter came on to be heard and considered by the Board of Tax Appeals upon appeal of the International Harvester Company from a final order by the tax commissioner, which final order denied an application theretofore filed by the appellant for the review and correction of certain additional corporation franchise tax assessments made against it by the tax commissioner under the provisions of Section 5461, General Code, for the tax years 1935, 1936, 1937, 1938 and 1939 in the amounts of $26,978.70, $31,416.71, $27,112.04, $23,787.15 and $25,390.28, respectively, and for the review and correction of an additional corporation franchise tax assessment made against it for the then current year 1940 in the amount of $29,882.66. This cause was heard and submitted upon the transcript of the proceedings before the tax commissioner, a stipulation and supplemental stipulation of facts, the evidence and arguments and briefs of counsel.

It appears from the record that appellant is a New Jersey corporation with its general business and account-

ing office in Chicago, and during the audit period was engaged in the manufacture of agricultural implements, tractors, motor trucks, binder twine and other similar commodities and parts thereof. It operated factories in several parts of the United States, including two in Springfield, Ohio. In 1934 and 1935 all goods manufactured or handled by appellant which were sold in the [fol. 137-A] United States were distributed by the International Harvester Company of America, which purchased the goods from the appellant f. o. b. factory. Such goods were delivered either by rail or drive away carrier to branches of International Harvester Company of America, by rail or drive away carrier to dealers of International Harvester Company of America, or by its dealers or the representatives transporting the goods from the factory. In the remaining years of the period appellant operated its own selling branches except in Wisconsin, in which state alone International Harvester Company of America continued to operate. During the entire period involved appellant sold its goods for foreign trade to International Harvester Export Company and the goods for Canada trade to International Harvester Company of Canada, Ltd. During said entire period appellant sold a small amount of works collaterals and repair parts direct to the public. All the capital stock of the three above-mentioned companies was owned directly or indirectly by appellant.

In the years 1936 to 1939, inclusive, appellant, in addition to its branches, also had some retail stores selling at retail to the public, and a number of motor truck substations selling motor trucks at retail to the public, and sometimes at wholesale to appellant's dealers, each of which stores and substations was under the supervision of the branch in the territory in which it was located. The Ohio branches were located in Columbus, Cincinnati, Toledo and Cleveland; the stores in Greenville, Van Wert, [fol. 138] Ashland, Bellevue, Canton, Findlay, Marion, Troy, Wooster, Massillon and Portsmouth; and the substations in Akron, Springfield and Youngstown.

In the years 1936 to 1939, inclusive, the branches sent orders to the factories to ship goods to them for storage at their warehouses until they could sell them or to ship goods to the dealers, and in a very few cases, to ship direct to the customers.

The goods manufactured at Springfield and sold to the Canada company were shipped to it f. o. b. factory and those sold to the export company were shipped f. o. b. factory to jobbers in foreign countries or to foreign subsidiaries of appellant.

All the proceeds from sales in cash and notes were received by the branches, which collected the principal and interest on the notes. Except for direct sales to customers of castings and repair parts, the function of each factory was limited to the manufacture of goods and the shipment thereof to the branches or direct to dealers or consumers on orders received from the branches or to foreign subsidiaries or jobbers on orders from the general office in Chicago. It was further stipulated between the parties as follows:

"8. (a) International Harvester Company had in 1934 to 1939 two factories in Ohio, both located in Springfield, known as the Springfield Works and the Springfield Spring Works. The Springfield Works produces motor trucks. The Springfield Spring Works manufactured coiled springs for agricultural machines. The springs were shipped to factories of the Inter- [fol. 138-A] national Harvester Company in other states for incorporation by those factories in agricultural machines. The Springfield Spring Works was discontinued at the end of 1939.

(b) A considerable part of the material and appliances used in the assembly of motor trucks at the Springfield Works is manufactured by the company outside of Ohio and is shipped to the Springfield Works for assembly into motor trucks. A considerable part is purchased from other suppliers both in Ohio and outside of Ohio and is shipped to the Springfield Works for assembly. In the years 1934 to 1938 inclusive the Springfield Works had a foundry manufacturing malleable castings, part of which was shipped to the Fort Wayne motor truck plant of the International Harvester Company at Fort Wayne, Indiana, and the rest used in the assembly of motor trucks at Springfield Works. The foundry was discontinued at the end of 1938. The Springfield Works made cabs and fenders and some bodies from sheet metal pur-

chased from mills both inside and outside of Ohio. Motors, frames, axles, transmissions, wheels, rims, tires, tubes, brakes and head lamps were either shipped to the Springfield Works from plants of the company outside Ohio, or were purchased from other manufacturers within or without Ohio.

9. Delivery of motor trucks from the Springfield factory was made partly by rail shipment from the factory to the branch or to the dealer's town, but chiefly by driveaway by a driveaway company from the factory to the branch or to the dealer, or by [fol. 139] driveaway by the dealer taking delivery himself at the factory. In a very small proportion of cases, probably less than 1%, shipment was made from the factory direct to the user, or delivery was made to the user at the factory who drove his own truck away.

(To which stipulation the tax commissioner objects on the grounds of competency and relevancy.)

10. The sales by International Harvester Company to International Harvester Company of America in 1934 and 1935 of Springfield Works' products, shipped or delivered to the Ohio branches of International Harvester Company of America, were as follows:

1934	$632,936.00
1935	982,202.00

The sales by the Ohio branches of the International Harvester Company of Springfield Works' products in 1936 to 1939 inclusive were as follows:

1936	$1,708,790.00
1937	1,967,693.00
1938	1,360,454.00
1939	1,858,184.00

11. Below is given a table showing in Column A the total sales by Ohio branches to Ohio buyers; in Column B the sales by Ohio branches to Ohio buyers which where of Ohio manufacture, namely the Springfield Works motor trucks; and in Column C the sales by Ohio branches to Ohio buyers of goods manufactured outside Ohio.

[fol. 139-A]

	A Sales by Ohio Branches to Ohio Buyers	B Sales by Ohio Branches to Ohio Buyers of Goods of Ohio manufacture, namely Springfield Works motor trucks	C Sales by Ohio Branches to Ohio Buyers of goods manufactured outside Ohio
1936	$7,951,470.80	$1,708,790.00	$6,242,680.80
1937	10,603,519.82	1,967,693.00	8,635,836.82
1938	7,222,372.72	1,360,454.00	5,861,918.72
1939	7,406,063.83	1,858,184.00	5,547,879.83

12. On its Ohio franchise tax returns for the years 1935 to 1940 inclusive, reporting sales for the year previous in each case, the company reported Ohio business as follows:

Ohio Return	Based on Figures of	Total Sales in Ohio per Return
1935	1934	$ 885,459.12*
1936	1935	1,531,876.34*
1937	1936	8,546,996.27
1938	1937	11,654,962.12
1939	1938	7,734,202.57
1940	1939	8,125,736.23

13. It is agreed that the figures set out in the following table show for the years 1934 to 1939 the correct amount of property in the state of Ohio, correct amount of the total property of the company, and

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* Shipments at sales prices from Springfield Works to Ohio branches of International Harvester Company of America are included here in the following amounts:

1934	$632,936.36
1935	982,202.80

Note: In 1936 the company changed its annual accounting period from a calendar year to a fiscal year ending October 31. In the above table the years 1934 and 1935 are calendar years. 1936 is a 10-month period —January 1 to October 31. The years 1937, 1938 and 1939 are fiscal years beginning November 1 and ending October 31.

[fol. 140] the correct percentage of the company's Ohio property to total property.

Year	Ohio Property	Total Property	Percentage in Ohio
1934	$7,367,100.00	$338,666,107.00	2.1753
1935	8,119,415.00	365,556,800.00	2.2211
1936	8,670,108.00	398,978,944.00	2.1730
1937	15,267,228.00	427,726,061.00	3.5694
1938	9,613,593.00	401,966,829.00	2.3916
1939	9,775,868.00	396,515,798.00	2.4654

It is also agreed that the total business of the company during this same period was as follows:

1934	$97,592,280
1935	133,703,278
1936	216,377,171
1937	303,394,978
1938	222,261,604
1939	213,001,465

It is further agreed that the total net worth of the company which shall be subject to the Ohio allocation percentage is for the years 1934 to 1939 as follows:

1934	$322,067,677
1935	338,224,220
1936	362,058,346
1937	373,603,141
1938	375,822,837
1939	368,784,979

14. In his computation, the tax commissioner has found the figure of business done in Ohio to be the [fol. 140-A] amount of the sales proceeds of all goods manufactured by the company in Ohio, plus the amount of the sales proceeds received by Ohio branches from the sale of general line goods, that is, agricultural implements and machinery, tractors, stationary engines, and parts sold by the Ohio branches to Ohio dealers and users. These general line goods were all manufactured by the company outside Ohio.

15. The total amount of inventories of motor trucks and attachments therefor, valued at cost or market whichever is lower, on hand at the various branch

house warehouses of the company located all over the United States at the close of business October 31, 1936, 1937, 1938 and 1939, together with the estimated portion representing the product of the Springfield, Ohio plant, was as follows:

	Total	Estimated Percentage Springfield	Springfield Product
Oct. 31, 1936	$8,800,965.95	55.455%	$4,880,575.67
Oct. 31, 1937	10,356,383.74	55.03%	5,699,117.97
Oct. 31, 1938	8,166,739.10	58.89%	4,809,392.66
Oct. 31, 1939	9,431,696.90	56.87%	5,363,806.03"

There is no dispute in any of the years involved as to the value of the issued and outstanding stock of appellant or as to the property fraction to be used for determining the base upon which the franchise fee should be computed, or as to the denominator of the business fraction. Consequently, the only matter in dispute is the numerator of the business fraction, which represents the value of the business done by appellant in this state during each of the years involved.

[fol. 141] In its annual reports the appellant listed the value of the business done by it in Ohio in the years 1934, 1935, 1936, 1937, 1938 and 1939 as $885,459.00, $1,531,876.00, $8,546,966.00, $11,654,962.00, $7,734,203.00, $8,125,736.00, respectively, whereas, the tax commissioner found the value of such business done in Ohio during said years to be $17,377,675.00, $27,074,872.00, $41,594,703.00, $51,115,516.00, $38,251,716.00 and $43,303,316.00, respectively.

The amount returned by appellant as Ohio business done in each of said years includes only the amount of goods sold which were manufactured in Ohio and delivered to branches, dealers and customers in Ohio. The tax commissioner in determining the value of the business done in Ohio during the years 1934 and 1935, used the value of the sales of all goods to the International Harvester Company of America manufactured in Ohio, wherever said goods were sold and delivered. In determining the value of business done in Ohio during the remaining years, the tax commissioner used the value of the sales of all goods manufactured in Ohio, sold and delivered within and without the state, plus the value of the goods manufactured outside

Ohio and sold to Ohio customers. The value of these sales may be broken down as follows:

	Goods Manufactured and Sold in Ohio	Goods Manufactured Inside and Sold Outside Ohio	Goods Manufactured Outside and Sold in Ohio
1936	$1,708,790	$33,047,707	$6,838,206
1937	1,967,693	39,460,554	9,687,269
1938	1,360,454	30,517,468	6,373,794
1939	1,858,184	35,177,580	6,267,552

[fol. 141-A] All of these figures were taken from the records of the appellant and are not in dispute.

The assessments for the years 1935 and 1936, in which are involved the value of business done in Ohio during the years 1934 and 1935, will be considered first since the manner of the transaction of appellants business during these two years presents a different situation than is presented for the remaining years.

As shown above, during the years 1934 and 1935 all goods manufactured by appellant in Ohio which were sold in the United States, were sold to International Harvester Company of America, a subsidiary, the capital stock of which was wholly owned directly or indirectly by appellant, and were sold and distributed to the public by said subsidiary in the same manner as such goods have been since sold and distributed by the appellant. It is true that a major portion of such goods sold by International Harvester Company of America was sold from warehouses, but said warehouses were owned by International Harvester Company of America and not by the appellant. The fact that the subsidiary company was wholly owned by appellant can make no difference. In the case of The Ohio Match Company v. Evatt, 24 O. O., 91, this board found that the tax commissioner did not err in including in Ohio business the amount of corporation sales made to its subsidiary. The board, following the case of North v. Higbee Company, 131 O. S., 507, held as shown by the first and third branches of the syllabus, as follows:

> "In the absence of fraud or a purpose to effect the same, the separate corporate entities of a parent [fol. 142] and subsidiary corporation will not be disregarded notwithstanding the fact that the subsidiary

corporation is controlled by the parent through its stock ownership, and notwithstanding the further fact that the officers and directors of the parent corporation are likewise officers and directors of the subsidiary corporation.

Where a foreign corporation at its plant in Ohio manufactured matches and other products which were sold through an Ohio corporation, its wholly owned subsidiary, the tax commissioner in determining the taxable valuation of the foreign corporation's issued and outstanding stock represented by the property owned and business done by the corporation in Ohio, and in determining the consequent amount of franchise taxes to be paid by the foreign corporation, did not err in including as Ohio business of the corporation sales made to its subsidiary, and did not err in including as property owned by the foreign corporation in Ohio accounts or notes receivable accruing to the foreign corporation from sales of its products to its subsidiary."

As to the tax assessed for the years 1935 and 1936, Rule No. 275 of the tax commissioner is not involved as none of the sales of goods manufactured in Ohio were sold by the appellant from warehouses outside of the state. The franchise tax for these two years was computed by the tax commissioner according to the amount of goods manufactured in Ohio irrespective of whether such goods [fol. 142-A] were sold within or without the state. The board is bound by the law of the Supreme Court as pronounced in the case of Aluminum Company of America v. Evatt, 140 O. S., 385, which it finds is directly applicable as to said two years. In that case the court held as follows:

"A franchise tax computed according to the amount of sales of goods manufactured in Ohio, irrespective of whether such goods are sold within or without the state, in intrastate or interstate commerce, where the payment of the tax is not made a condition of the selling of the goods in interstate or other commerce, but only of continuing in the manufacture of goods within the state, violates neither the commerce clause, Section 8, Article I of the Constitution of the United States, nor the Fourteenth Amendment thereto.

(American Mfg. Co. v. City of St. Louis, 250 U. S., 459 followed.)"

It is, therefore, considered and adjudged that the action of the tax commissioner in making the assessments complained of for the years 1935 and 1936 be, and the same hereby, is affirmed.

During the years 1936 to 1939, inclusive, appellant operated its own branches except in Wisconsin, in the same manner in which they had been operated by the International Harvester Company of America. In other words, outside of a small amount of castings and repair parts sold by the factories, on all sales of agricultural implements and machines, motor trucks, tractors and kindred lines to dealers and users in the United States, the orders were [fol. 143] solicited by agents of the branches, or the orders were received by mail by the branches, and in case any orders were received by the factories they would be transmitted to the proper branches. All orders had to be approved by the respective branches, which collected the purchase price of such sales and deposited the money in local banks, which was withdrawable only by the general office in Chicago. Appellant's branches would send shipping orders to the factories to ship goods to the branches for storage in warehouses at the branches until they could sell them, or to ship goods direct to the dealers, and in a few instances, direct to the users.

It is claimed by the appellant that the sales of goods manufactured out of Ohio and sold to Ohio customers should not be included in the numerator of the business fraction.

All of the goods which were manufactured out of the state and sold to Ohio customers were shipped on orders received from appellant's branches which it maintained in Ohio, and the board finds that the activities of such branches in this state and their authority in connection therewith constitute doing business within the state regardless of whether such goods were shipped to warehouses of the appellant within the state or directly to customers in Ohio on orders from the branches. In the case of International Harvester Company of America v. Kentucky, 234 U. S., 579, 58 L. Ed., 1479, the company claimed that so far as the company's activities in Kentucky were

concerned, it was engaged solely in interstate commerce and was, therefore, not subject to the jurisdiction of the [fol. 143-A] state. The court held, however, that the continuous solicitation of orders through local agents of the company of goods manufactured outside the state and delivered into the state, the agents having authority to receive money and notes for the purchase price of such goods, constituted doing business in Kentucky. See, also, on this point, International Harvester Company v. Department of Treasury, 322 U.S., 340, 88 L. Ed., 905. The board further finds that the tax commissioner's Rule No. 275, which the board has heretofore held valid, is applicable to sales of goods from its warehouses in Ohio. The pertinent portion of this rule reads as follows:

> "All sales of goods from warehouses in Ohio, wherever manufactured, shall be considered as Ohio sales."

There is some contention that this rule cannot apply to the assessments which were for the years prior to its effective date. However, the same situation existed in the case of Aluminum Company of America v. Evatt, supra, and the rule was held applicable. In each case the assessments were for years prior to the effective date of the rule, but were not actually made until after such date. Appellant practically concedes the taxability of these sales in its brief by the following language:

> "We submit that for the sales to be Ohio sales probably all, but certainly at least one, of the following three conditions should be met:
>
> (1) Salesmen must be sent out from the Ohio office of the taxpayer to solicit orders or contracts of sale. [fol. 144] (2) The orders or contracts must be accepted in Ohio.
>
> (3) The proceeds of the sales must be remitted to the branches in Ohio making the sales.
>
> • • • • • • •
>
> All of these conditions are present in sales made by the Ohio branches."

Under Section 5498, General Code, the numerator of the business fraction is the value of the business done in

this state. The tax commissioner has included in this value the amount of such sales, and since the sales in question constituted doing business in Ohio, the board finds that the action of the tax commissioner in including in the numerator of the business fraction the value of all sales of goods manufactured outside of Ohio to customers in Ohio was proper, and the same hereby is affirmed.

As the stipulation and the evidence show, a considerable portion of the sales to customers outside Ohio of goods manufactured in Ohio, were made during the years 1936 to 1939, inclusive, from warehouses outside Ohio. The board finds that Rule No. 275 of the tax commissioner is applicable to such sales from warehouses outside of Ohio of all goods manufactured in the state. The pertinent portion of this rule reads as follows:

> "In the case of manufacturing companies, all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state."

[fol. 144-A] The difficulty lies here in determining the portion of the total sales of goods manufactured and shipped out of the state which were sold from warehouses. From a reading of the testimony it is probable that a major portion of the goods sold by the branches to dealers was sold from stock on hand at the branches. Of course, the main purpose of maintaining warehouses is to provide for the filling of orders received by branches from stock on hand rather than having each order shipped from factories located in various parts of the country, and thus facilitate deliveries. It is conceded that a very small percentage of goods sold by branches was shipped direct to consumers. From the record in this case it certainly cannot be said that none of the goods manufactured in Ohio and sold to customers outside the state was sold from warehouses.

The assessments in question cover the activities of the appellant as far back as 1934, and at the time of the hearing no records were in existence by which the amount of trucks manufactured in Ohio and delivered to branches outside of Ohio could be determined except for the year 1939. The property invoices issued by the Springfield Works to the branch houses during the year 1939 were in

existence, which show whether the goods included therein were shipped to dealers, customers or branch houses. For the purpose of determining what percentage of goods manufactured at Springfield was delivered to appellant's branches and what percentage was delivered to dealers and consumers, the auditor at Springfield caused to be examined all the property invoices issued during that year and [fol. 145] made a compilation thereof. This work involved the examination of approximately fifty-eight thousand invoices. According to the testimony, these invoices are the only records available upon which such a determination can be made. This compilation shows that in the year 1939 62.3% of the goods manufactured in Ohio was delivered to the branch houses and 37.7% was delivered directly to dealers or consumers. The stipulation also shows that the inventories of goods manufactured in Ohio and on hand in warehouses at the close of the fiscal years 1936 to 1939, inclusive, ranged from $4,809,392.66 to $5,699,117.97, and that the portion of all goods on hand representing Ohio products in each of said years remained substantially uniform. The natural conclusion from this is that the situation which existed in 1939 remained approximately the same during the preceding years, namely, that approximately 62% of the goods sold which were manufactured in Ohio was delivered to branch warehouses. Since these are the only records in existence, the board finds that these records are the only basis upon which an estimate can be made with any degree of certainty of the portion of goods manufactured in Ohio, which was sold from warehouses.

However, objection has been made to the admissibility of the auditor's compilation for the year 1939, which was offered in evidence as Appellant's Exhibit No. 5, as being immaterial; but the serious question is as to its competency since the best evidence would be the original invoices, which, because of their volume, were not presented at the hearing. The general rule is stated in 17 O. J., 197 and 198 (Section 175), as follows:

[fol. 145-A] "In the absence of some special reason, the testimony of private auditors and of accountants is inadmissible to show the contents of original accounts or books. Such evidence may, of course, be the best evidence which can be produced of lost or destroyed books and accounts, and admissible as such. And the

general rule is that in the sound discretion of the court, where books and documents of account are numerous and voluminous, the testimony of a competent expert accountant as to the result of his examination of the books is admissible, though in such case the books and documents must either be first offered in evidence, or be in the custody of the court so that the opposite party may have the opportunity, by examining the originals, to verify the correctness of the abstracts and schedules thereof, offered against him."

This section also states:

"If it does not appear, however, that the objecting party made any effort to secure missing books, that he had any desire to examine them, or that they were not actually in the custody of the court, such testimony may be proper."

Wigmore on Evidence, Third Edition, Section 1230, reads as follows:

"Where a fact could be ascertained only by the inspection of a large number of documents made up of very numerous detailed statements—as, the net balance resulting from a year's vouchers of a treasurer or a year's accounts in a bank-ledger—it is [fol. 146] obvious that it would often be practically out of the question to apply the present principle by requiring the production of the entire mass of documents and entries to be perused by the jury or read aloud to them. The convenience of trials demands that other evidence be allowed to be offered, in the shape of testimony of a competent witness who has perused the entire mass and will state summarily the net result. Such a practice is well established to be proper."

Jones on Evidence, Third Edition, states in Section 206:

"Where the originals consist of numerous documents which cannot be conveniently examined in court, and the fact to be proved is the general result of an examination of the whole collection, evidence may be given as to such result by any person who has examined the documents and who is skilled in such matters, provided the result is capable of being ascertained by calculation."

There has been no desire expressed for an opportunity to examine the original invoices, and it appears that most of the figures used by the tax commissioner were furnished to him by the appellant and were received by him without question. The board is of the view that under the circumstances in this case the testimony of the auditor on this matter and Exhibit 5 should be admitted in evidence, and the objection of the appellee is, therefore, overruled. Mathe- [fol. 146-A] matical exactitude cannot always be attained, but, as stated in Illinois Central Railroad Company v. Minnesota, 309 U. S., 157, 84 L. Ed., 670, "rough approximation rather than precision is the norm in a tax system."

From a full consideration of the evidence and the stipulations, the board finds that in each of the years 1936 to 1939, inclusive, 62% of the sales of goods manufactured in Ohio and sold to customers in states other than Ohio was sold from warehouses outside the state and, therefore, should be excluded from the numerator of the business fraction in determining the base for the purpose of computing the franchise fee for the years 1937 to 1940, inclusive, and in this respect the action of the tax commissioner is modified.

It is contended that the tax assessments in question violate the due process and commerce clauses of the United States Constitution. The full and careful consideration by the Supreme Court of Ohio of the questions raised in Aluminum Company of America v. Evatt, supra, so completely answers the claims of the appellant in this case that it is unnecessary to discuss the cases cited by appellant, some of which were considered in the opinion in that case.

The board is of the opinion that the tax as herein modified is properly apportioned to the business done and property owned within the state and, therefore, violates none of the rights of the appellant guaranteed by the federal Constitution. It is claimed that the assessment in question results in double or multiple taxation. However, such taxa- [fol. 147] tion of itself is not constitutionally objectionable. Fidelity & Columbia Trust Company v. City of Louisville, 245 U. S., 54, 62 L. Ed. 145; Cream of Wheat Company v. County of Grand Fork, 253 U. S., 325, 64 L. Ed., 931. In

Tax Commission v. Aldrich, 316 U. S., 174, 86 L. Ed., 1358, the court said:

> "It is not the province of the courts to provide a system to protect against multiple taxation."

Where the activities of a company are extensive in territory and complex, as in this case, it is possible that the same subject may be taxed by more than one state. It is not to be assumed that taxes levied by other states are lawful and those levied by this state are improperly imposed. It is only where the tax necessarily results in a direct and unjust discrimination against interstate commerce and is imposed with the purpose or effect of defeating constitutional rights that such a tax is invalid, and where the tax is proportioned to the business done or property owned within the state it is valid even though double taxation may incidentally result.

The following is stated in Hump Hairpin Manufacturing Company v. Emmerson, 258 U. S., 290, 66 L. Ed., 622:

> "While a state may not use its taxing power to regulate or burden interstate commerce, a state excise tax which affects such commerce not directly, but only incidentally and remotely, may be entirely valid, where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights."

[fol. 147-A] And in International Shoe Company v. Shartel, 279 U. S., 429, 73 L. Ed., 781, the third and fourth headnotes read as follows:

> "The mere fact that a corporation is engaged in interstate commerce does not relieve it of local tax burdens in respect of its property within the state or its intrastate business.
>
> A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing a local business, if apportioned to business done or property owned within the state, is not invalid under the commerce clause merely because a part of the property or capital included in computing the tax is used by it in interstate commerce."

In Coverdale v. Arkansas-Louisiana Pipe Line Company, 303 U. S., 604, 82 L. Ed., 1043, the third and fifth headnotes read as follows:

"The exemption of those engaged in interstate commerce from nondiscriminatory taxes should not be extended beyond the necessity of keeping that commerce free from interference.

The fact that the imposition of a state tax adds to the cost of interstate commerce is not alone sufficient to invalidate the tax as an interference with that commerce."

In Illinois Central Railroad Company v. Minnesota, supra, the following is held:

"The Fourteenth Amendment does not forbid double taxation, short of confiscation or proceedings unconstitutional on other grounds.

[fol. 148] A state property tax on railroads owning or operating lines within the state, based on the gross earnings derived from operations within the state, does not violate the commerce clause of the federal Constitution, where such tax has a fair relation to the property employed in the state."

The following rule is laid down in General Trading Company v. State Tax Commission, 88 L. Ed., 914:

"While no state can tax the privilege of doing interstate business, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce, does not exempt it from state taxation, so long as such taxation is not obviously hostile or practically discriminatory toward such commerce."

In International Harvester Company v. Department of Treasury, 88 L. Ed., 905, the court held with reference to a gross income tax:

"Neither the commerce clause nor the due process clause of the Fourteenth Amendment preclude a state from levying a gross income tax in respect to the proceeds of sales by foreign corporations authorized to

do business in the state by branches located outside the state to purchasers residing in the state who took deliveries at factories within the state, by branches located in the state to purchasers residing outside of but coming into the state to take delivery, and by branches within the state to customers residing in the state, of [fol. 148-A] goods shipped to such customers from points outside the state, pursuant to contracts so providing."

It is considered and adjudged by the board that the action of the tax commissioner in making the assessment complained of be, and hereby is, modified in the respect herein above set forth, and that as modified the same be, and hereby is, affirmed. And the tax commissioner is directed to correct his assessment certificate in accordance with this entry.

[Duly certified.]

BEFORE BOARD OF TAX APPEALS OF OHIO

APPELLANT'S PETITION FOR REHEARING—

Filed March 3, 1945.

International Harvester Company, appellant in the foregoing cause, respectfully petitions for a rehearing in the matter of the decision of the Board of Tax Appeals, Department of Taxation of Ohio, entered in the above-entitled cause February 14, 1945, on the grounds set out below.

(1) The decision of the Board of Tax Appeals in this cause, as set out in its "Entry", is erroneous in stating that appellant practically concedes the taxability of sales by branches outside of Ohio when the trucks were shipped direct from Springfield Works to the buyers in other states.

On page 8 of the "entry" of the Board of Tax Appeals in this cause it is stated that:

"Appellant practically concedes the taxability of these sales in its brief by the following language: [fol. 149] 'We submit that for the sales to be Ohio sales probably all, but certainly at least one of the following three conditions should be met:

'(1) Salesmen must be sent out from the Ohio office of the taxpayer to solicit orders or contracts of sale.

'(2) The orders or contracts must be accepted in Ohio.

'(3) The proceeds of the sales must be remitted to the branches in Ohio making the sales.

• • • • • • • • • •

'All of these conditions are present in sales made by the Ohio branches.' "

We respectfully submit that the board has misunderstood the argument in appellant's brief. The above language appears at the bottom of page 10 of appellant's brief and continues to the end of the first paragraph on page 11. There is one sentence omitted in the opinion of the board which is vital to the understanding of the appellant's point. We quote below the argument in full, given by the appellant.

"In the additional assessments involved in this appeal, the tax commissioner has used total sales of the company in the denominator of the fraction as total business done. Accordingly, it follows that in the numerator of the fraction Ohio business should be Ohio sales. We submit that for the sales to be Ohio sales probably all, but certainly at least one, of the following three conditions should be met:

[fol. 149-A] (1) Salesmen must be sent out from the Ohio office of the taxpayer to solicit orders or contracts of sale.

(2) The orders or contracts must be accepted in Ohio.

(3) The proceeds of the sales must be remitted to the branches in Ohio making the sales.

None of these conditions is present in the case of shipments by the Springfield Works to buyers in other states where the sales were negotiated by branches located in other states. All of these conditions are present in sales made by the Ohio branches."

It will be noticed that the sentence "None of these conditions is present in the case of shipments by the Spring-

field Works to buyers in other states where the sales were negotiated by branches located in other states" is omitted on page 8 of the board's opinion.

Therefore, appellant did not in any manner concede the taxability of these sales by the above language. The above language means that all these conditions were present in sales made by Ohio branches, namely the branches at Cincinnati, Cleveland, Toledo and Columbus. These sales were all included in Ohio business in the original franchise tax returns filed by appellant.

We did wholly concede that those sales were Ohio sales. But we said in the language quoted above that none of the three elements above specified was present when sales of Springfield trucks were made by branches outside of Ohio. [fol. 150] The branches outside Ohio sold the goods, accepted the orders and received the sales proceeds.

This is so crucial a misunderstanding that we believe a rehearing is warranted for this reason alone.

When the trucks were sold by branches outside of Ohio, the whole sale from beginning to end was handled by the branch outside of Ohio, the order solicited by it, the order or contract was accepted by it, the sales proceeds were received by it, and the trucks were not sold from any warehouse in Ohio. The factory at Springfield is a factory only and it has no warehouse. The factory at Springfield is in no sense a selling branch, and the evidence showed that it did not even know the sales proceeds of a truck shipped by it. In the case of the sale of a truck by a branch outside of Ohio, when the truck was shipped from Springfield Works direct to the dealer in another state, the truck cannot be considered as sold from a warehouse in Ohio.

(2) In its decision the Board of Tax Appeals has given no consideration to the point made in appellant's brief on page 39 that the fiscal period ended October 31, 1936, was only a 10 months' period, and that the tax for that 10 months' period should be reduced to five-sixths of the annual tax.

The fiscal year ended October 31, 1936, was only a 10 months' period (S. 9). At the end of 1935 International Harvester Company changed from a calendar year to a fiscal year basis ending on October 31. Accordingly, its last return to the state of Ohio and other states and for federal income tax purposes on the calendar year

[fol. 150-A] basis was the calendar year 1935. Obviously, International Harvester Company was taxed for the full year 1935 on a calendar year basis. It has also been taxed for the full year beginning November 1, 1936 and ending October 31, 1937 on a 12 months' basis. If then for the fiscal period beginning January 1, 1936 and ending October 31, 1936 the tax is computed on a 12 months' basis, the company is being taxed twice for the last two months of 1936. It is obvious, therefore, that the tax for the fiscal period of 10 months ending October 31, 1936 should be reduced to five-sixths of the annual tax.

We submit that the taxpayer is entitled to a rehearing also on this point that the tax for the 10 months' period ending October 31, 1936 should be reduced to five-sixths of the annual tax.

(3) The Board of Tax Appeals in its decision as set out in its "entry" makes no provision for deduction of the amount of goods sold by branches of the company in Ohio, when the goods were shipped direct from factories or transfer warehouses of the company outside of Ohio to buyers in Ohio.

Under the decision of the board in this case, as set out in its "Entry", there will be excluded all sales of trucks made by branches outside of Ohio where the trucks were delivered off the branch house floors of those branches. But under the opinion, there will be still included in Ohio business all sales of trucks manufactured at the Springfield Works where the trucks were sold by branches outside of Ohio and the trucks were shipped direct by the Springfield Works to the buyers outside of Ohio.

[fol. 151] Also under the decision there will still be included in Ohio business all sales of goods by Ohio branches to Ohio buyers where the goods were shipped direct from factories or transfer warehouses of the taxpayer outside of Ohio to buyers in Ohio.

On this point, of course, we are in no way conceding the validity of the inclusion of sales by branches outside of Ohio where the goods were shipped direct from the Springfield Works to buyers in other states. We are limiting ourselves on this point merely to pointing out the inconsistency of including as Ohio business sales by branches outside of Ohio of goods manufactured in Ohio, which were shipped to buyers in other states, and yet at the same time

including in Ohio business sales by Ohio branches to Ohio buyers of goods manufactured outside Ohio, which were shipped direct from points outside Ohio to the buyers in Ohio. There is no possible way of justifying the inclusion of both these classes of sales.

We submit that if it should be held that sales by branches outside Ohio to buyers in other states, where the goods were shipped direct from the Springfield Works to the buyers in other states, should be included in Ohio business, then obviously there should be excluded from Ohio business sales by Ohio branches to Ohio buyers where the goods were shipped either from factories or transfer warehouses outside Ohio to the buyers in Ohio.

The record in this case shows that 38% of the Springfield trucks were shipped from the factory direct to the [fol. 151-A] buyers. It is a fair conclusion that a large proportion of other goods were shipped by the factories and warehouses outside Ohio direct to the buyers in Ohio.

We submit that the failure in the board's decision to provide for the exclusion of sales by Ohio branches, where the goods were shipped direct from factories or transfer warehouses outside of Ohio to the buyers in Ohio, while at the same time holding that there must be included sales by branches outside of Ohio where the goods were shipped from the Springfield Works direct to the buyers outside of Ohio, is a further ground entitling the appellant to a rehearing.

Respectfully submitted this second day of March, 1945.

Edward R. Lewis, Attorney for Appellant, International Harvester Company.

BEFORE BOARD OF TAX APPEALS OF OHIO

ORDER DENYING PETITION FOR REHEARING—

Entered March 12, 1945

This cause came on to be considered upon the petition of the appellant for a rehearing in the matter of the decision heretofore entered herein on February 14, 1945. On consideration thereof the board finds said petition not well taken, and it is therefore considered and adjudged by the

board that said petition for a rehearing be, and the same hereby is, denied.

[Duly certified.]

[fol. 152] APPELLEE'S EXHIBIT "G"—July 3, 1941

Department of Taxation
Division of Franchise Tax
State of Ohio
Columbus, Ohio

Attention: Mr. J. W. Foley, Examiner

Gentlemen:

Complying with your verbal request in conference in your offices in Columbus on May 21, 1941, we enclose herewith the following Exhibits and supporting Schedules:

1. Exhibit A, together with Schedules 1 to 5, statements showing the separation of the International Harvester Company's sales of motor trucks, attachments and parts therefor between Springfield, Ohio product, Fort Wayne, Indiana product and other product for the years 1934 to 1939, inclusive.

2. Exhibit B, statement showing sales of Springfield product by the Company's selling branches located in Ohio for the years 1936 to 1939.

3. Exhibit C, statement showing sales of works collateral parts made by the Springfield, Ohio plants in the years 1934 and 1935.

It is our understanding that you desire this information in order that you may revise the computation of proposed taxes submitted with your letter of March 25, 1941. The original sales computation, as you remember, was prepared on a unit basis. In other words you divided total proceeds from sales of the motor truck line by the total number of units sold and multiplied the average proceeds per unit thus obtained by the number of Springfield units sold. This resulted in assigning to Springfield product an amount of proceeds which was entirely too great because of the fact that the heavy duty or higher priced trucks were all produced at the Fort Wayne, Indiana plant, while the lower priced models were produced at Springfield.

We do not concede that the total sales of Springfield Product constitute Ohio business; but are submitting this information merely to comply with your request.

You will find that generally the figures in the attached exhibits and schedules are self explanatory. In some cases we were obliged to use percentages in order to arrive at our results.

[fol. 153] In making your revision it seems to us that you should add the totals for Springfield by years shown on Exhibit A to the totals for Exhibit C, deduct the totals by years shown on Exhibit B and then pick up the sales for the years 1936 to 1939 as shown in our franchise tax returns. The latter figures include sales of works collaterals for 1936 to 1939 corresponding to those for 1934 and 1935 shown on Exhibit C.

We wish to thank you for your fine cooperation in allowing us ample time in which to compile our figures and we hope they will be satisfactory. In case more information will be required or you have any questions relative to the enclosed statements please let us hear from you.

Yours very truly, International Harvester Company,
C. L. Johns, Auditor of Tax Returns.

B

[fol. 154]

EXHIBIT A

International Harvester Company

Total Sales of Motor Trucks, Attachments, and Parts Separated Between Springfield, Fort Wayne, and Other Product
Years 1934 to 1939, Inclusive

Summary

Sales of Motor Trucks, Attachments, and Parts	1934 Total Proceeds	Springfield Product	Fort Wayne Product	Other Product
To Dealers and Users	$	$	$	$
To Subsidiaries (Sch. 1):				
I. H. Co. of America	27,994,665.18	14,602,910.59	13,391,754.59	
I. H. Co. of Canada, Ltd.	137,700.00	110,700.00	27,000.00	
I. H. Export Company	5,076,110.59	2,411,541.50	2,664,569.09	
	$33,208,475.77	$17,125,152.09	$16,083,323.68	$
	1935			
To Dealers and Users	$	$	$	$
To Subsidiaries (Sch. 1):				
I. H. Co. of America	42,690,175.80	22,346,152.90	20,344,022.90	
I. H. Co. of Canada, Ltd.	4,200.00		4,200.00	
I. H. Export Company	6,917,466.96	4,179,046.49	2,738,420.47	
	$49,611,842.76	$26,525,199.39	$23,086,643.37	$
	1936			
To Dealers and Users (Sch. 2)	$63,064,606.62	$30,905,079.77	$31,974,406.13	$185,120.72
To Subsidiaries (Sch. 1):				
I. H. Co. of America	1,274,965.21	616,010.75	658,954.46	
I. H. Co. of Canada, Ltd.	25,500.00	11,368.28	14,131.72	
I. H. Export Company	6,746,003.67	3,224,038.64	3,521,965.03	
	$71,111,075.50	$34,756,497.44	$36,169,457.34	$185,120.72

EXHIBIT A—Continued

International Harvester Company

Total Sales of Motor Trucks, Attachments, and Parts Separated Between Springfield, Fort Wayne, and Other Product
Years 1934 to 1939, Inclusive

Summary

Sales of Motor Trucks, Attachments, and Parts	Total Proceeds	Springfield Product	Fort Wayne Product	Other Product
1937				
To Dealers and Users (Sch. 3)	$73,152,499.09	$35,885,419.19	$37,098,780.10	$168,299.80
To Subsidiaries (Sch. 1):				
I. H. Co. of America	1,896,494.02	942,980.15	953,513.87	.....
I. H. Co. of Canada, Ltd.	103,800.00	46,115.14	57,684.86	.....
I. H. Export Company	9,775,000.00	4,553,732.50	5,221,267.50	.....
	$84,927,793.11	$41,428,246.98	$43,331,246.33	$168,299.80
[fol. 155]				
1938				
To Dealers and Users (Sch. 4)	$54,665,956.87	$27,385,978.00	$27,196,558.16	$83,420.71
To Subsidiaries (Sch. 1):				
I. H. Co. of America	1,001,042.33	498,259.28	502,783.05	.....
I. H. Co. of Canada, Ltd.	96,600.00	48,054.24	48,545.76	.....
I. H. Export Co.	7,900,000.00	3,945,630.00	3,954,370.00	.....
	$63,663,599.20	$31,877,921.52	$31,702,256.97	$83,420.71
1939				
To Dealers and Users (Sch. 5)	$67,284,950.21	$32,328,826.09	$34,861,361.83	$94,762.29
To Subsidiaries (Sch. 1):				
I. H. Co. of America	1,631,331.83	821,579.61	809,752.22	.....
I. H. Co. of Canada, Ltd.	57,000.00	26,728.90	30,271.10	.....
I. H. Export Co.	7,985,000.00	3,858,629.50	4,126,370.50	.....
	$76,958,282.04	$37,035,764.10	$39,827,755.65	$94,762.29

[fol. 156]

SCHEDULE 1

International Harvester Company

Sales of Motor Trucks, Attachments, and Parts to Subsidiary Companies Separated Between Springfield and Fort Wayne Product

Sales to Subsidiaries	Total Motor Truck Sales	Springfield Product	Fort Wayne Product
1934			
I. H. Co. of America:			
Motor Trucks and Attachments	$24,093,093.36	$14,602,910.50	$9,490,182.77
Repair parts	3,901,571.82	.....	3,901,571.82
I. H. Co. of Canada, Ltd.:			
Motor Trucks and Attachments	112,700.00	110,700.00	2,000.00
Repair Parts	25,000.00	.....	25,000.00
I. H. Export Company:			
Motor Trucks	3,522,850.65	2,221,913.25	1,300,937.40
Attachments	300,656.25	189,628.25	111,028.00
Repair Parts	1,252,603.69	.....	1,252,603.69
	$33,208,475.77	$17,125,152.09	$16,083,323.68
1935			
I. H. Co. of America:			
Motor Trucks and Attachments	$37,541,497.50	$22,346,152.90	$15,195,344.60
Repair Parts	5,148,678.30	.....	5,148,678.30
I. H. Co. of Canada, Ltd.:			
Motor Trucks and Attachments	3,200.00	.....	3,200.00
Repair Parts	1,000.00	.....	1,000.00
I. H. Export Company:			
Motor Trucks	5,365,092.00	3,936,350.00	1,428,742.00
Attachments	330,785.85	242,696.49	88,089.36
Repair Parts	1,221,589.11	.....	1,221,589.11
	$49,611,842.76	$26,525,199.39	$23,086,643.37

SCHEDULE 1—Continued

[fol. 157]

Sales to Subsidiaries	1936 Proceeds	% Springfield	Springfield Product	Fort Wayne Product
I. H. Co. of America:				
Trucks and Attachments	$1,110,829.95	55.455%	$616,010.75	$494,819.20
Parts	164,135.26		.....	164,135.26
	$1,274,965.21		$616,010.75	$658,954.46
I. H. Co. of Canada, Ltd.:				
Trucks and Attachments	$20,500.00	55.455%	$11,368.28	$9,131.72
Parts	5,000.00		.....	5,000.00
	$25,500.00		$11,368.28	$14,131.72
I. H. Export Co.:				
Trucks and Attachments	$5,813,792.52	55.455%	$3,224,038.64	$2,589,753.88
Parts	932,211.15		.....	932,211.15
	$6,746,003.67		$3,224,038.64	$3,521,965.03
	1937			
I. H. Co. of America:				
Trucks and Attachments	$1,713,574.69	55.03%	$942,980.15	$770,594.54
Parts	182,919.33		.....	182,919.33
	$1,896,494.02		$942,980.15	$953,513.87
I. H. Co. of Canada, Ltd.:				
Trucks and Attachments	$83,800.00	55.03%	$46,115.14	$37,684.86
Parts	20,000.00		.....	20,000.00
	$103,800.00		$46,115.14	$57,684.86
I. H. Export Co.:				
Trucks and Attachments	$8,275,000.00	55.03%	$4,553,732.50	$3,721,267.50
Parts	1,500,000.00		.....	1,500,000.00
	$9,775,000.00		$4,553,732.50	$5,221,267.50

[fol. 158]

SCHEDULE 1---Continued

Sales to Subsidiaries	Proceeds	% Springfield	Springfield Product	Fort Wayne Product
1938				
I. H. Co. of America:				
Trucks and Attachments	$864,084.70	58.89%	$498,259.28	$347,825.42
Parts	154,957.63		.....	154,957.63
	$1,001,042.33		$498,259.28	$502,783.05
I. H. Co. of Canada, Ltd.:				
Trucks and Attachments	$81,600.00	58.89%	$48,054.24	$33,545.76
Parts	15,000.00		.....	15,000.00
	$96,600.00		$48,054.24	$48,545.76
I. H. Export Company:				
Trucks and Attachments	$6,700,000.00	58.89%	$3,945,630.00	$2,754,370.00
Parts	1,200,000.00		.....	1,200,000.00
	$7,900,000.00		$3,945,630.00	$3,954,370.00
1939				
I. H. Co. of America:				
Trucks and Attachments	$1,444,662.59	56.87%	$821,579.61	$623,082.98
Parts	186,669.24		.....	186,669.24
	$1,631,331.83		$821,579.61	$809,752.22
I. H. Co. of Canada, Ltd.:				
Trucks and Attachments	$47,000.00	56.87%	$26,728.90	$20,271.10
Parts	10,000.00		.....	10,000.00
	$57,000.00		$26,728.90	$30,271.10
I. H. Export Company:				
Trucks and Attachments	$6,785,000.00	56.87%	$3,858,629.50	$2,926,370.50
Parts	1,200,000.00		.....	1,200,000.00
	$7,985,000.00		$3,858,629.50	$4,126,370.50

[fol. 159]

SCHEDULE 2

International Harvester Company

Sales of Motor Trucks, Attachments, and Parts Separated Between Springfield, Fort Wayne, and Other Product Details

1936

Model	Total Proceeds	Springfield Product	Fort Wayne Product	Other Product
C-1	$9,811,724.50	$9,811,724.50	.....	
C-5	702,259.54	702,259.54	.....	
C-15	843,675.78	843,675.78	.....	
C-10	147,838.80	147,838.80	.....	
C-20	650,108.62	650,108.62	.....	
C-12	51,004.01	51,004.01	.....	
C-30	10,971,017.33	10,971,017.33	.....	
CS-30	1,340,623.05	1,340,623.05	.....	
C-300	55,904.78	55,904.78	.....	
M-2 and M-3	257,926.99	257,926.99	.....	
C-35	5,170,199.48	.....	5,170,199.48	
CS-35	2,603,550.06	.....	2,603,550.06	
C-35-B	39,233.27	.....	39,233.27	
CS-35-B	5,655.14	.....	5,655.14	
C-40	5,241,444.72	.....	5,241,444.72	
CS-40	1,078,048.49	.....	1,078,048.49	
C-50	1,540,475.25	.....	1,540,475.25	
CS-50	21,596.62	.....	21,596.62	
C-55	871,462.29	.....	871,462.29	
C-60	1,788,037.96	.....	1,788,037.96	
A-7	47,072.53	.....	47,072.53	
A-8	167,059.36	.....	167,059.36	
C-35-T	51,339.41	.....	51,339.41	
CS-35-T	141,840.98	.....	141,840.98	
C-40-T	144,674.30	.....	144,674.30	
CS-40-T	96,513.01	.....	96,513.01	
C-40-F	234,277.96	.....	234,277.96	

SCHEDULE 2—Continued

International Harvester Company

Sales of Motor Trucks, Attachments, and Parts Separated Between Springfield, Fort Wayne, and Other Product Details

1936

Model	Total Proceeds	Springfield Product	Fort Wayne Product	Other Product	
C-50-T	83,070.16	.....	83,070.16		
C-50-F	21,132.62	.....	21,132.62		
C-55-T	41,281.84	.....	41,281.84		
C-55-F	403,636.37	.....	403,636.37		
C-60-T	85,778.31	.....	85,778.31		
A-7-F	17,958.59	.....	17,958.59		
A-8-F	50,848.62	.....	50,848.62		
	$44,778,270.74	$24,832,083.40	$19,946,187.34	.....	Spfld. 55.455%
All Others	71,941.78	.....	.....	$71,941.78	
Barter Trucks	113,178.94	.....	.....	113,178.94	
	$44,963,391.46	$24,832,083.40	$19,946,187.34	$185,120.72	
Attachments	10,951,215.16	6,072,996.37	4,878,218.79	.....	Spfld. 55.455%
	$55,914,606.62	$30,905,079.77	$24,824,406.13	$185,120.72	
Parts	7,150,000.00	.....	7,150,000.00	.....	
Totals	$63,064,606.62	$30,905,079.77	$31,974,406.13	$185,120.72	

[fol. 160]

SCHEDULE 3

International Harvester Company

Sales of Motor Trucks, Attachments, and Parts Separated Between Springfield, Fort Wayne, and Other Product Details

1937

Model	Total Proceeds	Springfield Product	Fort Wayne Product	Other Product
D-2	$6,921,372.72	$6,921,372.72	$.....	
D-5	217,036.58	217,036.58	.....	
D-15	2,024,833.56	2,024,833.56	.....	
D-30	8,023,702.63	8,023,702.63	.....	
DS-30	1,032,951.47	1,032,951.47	.....	
D-300	410,569.78	410,569.78	.....	
DS-300	27,305.93	27,305.93	.....	
D-35	4,423,305.04	.....	4,423,305.04	
DS-35	1,374,784.16	.....	1,374,784.16	
D-40	4,347,926.73	.....	4,347,926.73	
D-50	905,576.64	.....	905,576.64	
D-60	180,266.94	.....	180,266.94	
DR-60	446,014.31	.....	446,014.31	
DR-70	154,648.29	.....	154,648.29	
A-8	285,202.29	.....	285,202.29	
D-216-T	15,200.75	.....	15,200.75	
DS-216-T	1,591.81	.....	1,591.81	
D-246-T	40,097.30	.....	40,097.30	
D-246-F	86,941.26	.....	86,941.26	
DR-346-T	34,783.05	.....	34,783.05	
D-346-F	100,868.57	.....	100,868.57	
DR-426-F	5,553.91	.....	5,553.91	
AR-626-F	115,069.36	.....	115,069.36	
C-1	3,276,968.18	3,276,968.18	.....	
C-5	392,586.56	392,586.56	.....	
C-15	946,599.05	946,599.05	.....	
C-10	36,600.57	36,600.57	.....	
C-20	199,096.94	199,096.94	.....	
C-12	57,859.27	57,859.27	.....	
C-30	4,136,008.79	4,136,008.79	.....	
CS-30	726,891.43	726,891.43	.....	
C-300	282,976.40	282,976.40	.....	
CS-300				

CS-300	6,943.01	6,943.01			
M-2	2,140.80	2,140.80			
M-3	211,552.03	211,552.03			
C-35	2,260,528.58		2,260,528.58		
CS-35	1,247,992.15		1,247,992.15		
C-35-B	36,178.15		36,178.15		
CS-35-B	2,826.29		2,826.29		
C-40	3,076,018.94		3,076,018.94		
CS-40	1,064,774.09		1,064,774.09		
C-50	596,788.75		596,788.75		
CS-50	227,995.88		227,995.88		
[fol. 161]					
C-55	540,118.69		540,118.69		
C-60	1,134,040.74		1,134,040.74		
A-7	10.75*		10.75*		
C-35-T	31,736.88		31,736.88		
CS-35-T	61,889.72		61,889.72		
C-40-T	51,940.90		51,940.90		
CS-40-T	94,767.21		94,767.21		
C-40-F	171,618.27		171,618.27		
C-50-T	33,314.24		33,314.24		
CS-50-T	17,385.36		17,385.36		
C-50-F	55,102.43		55,102.43		
C-55-F	315,818.25		315,818.25		
C-55-T	24,721.23		24,721.23		
C-60-T	51,898.10		51,898.10		
A-7-F	60,869.25		60,869.25		
A-8-F	5,874.70		5,874.70		
All Others	$52,666,014.16	$28,983,995.70	$23,682,018.46	$	
Barter Trucks	15,713.03			15,713.03	Spfd. 55.03%
	152,586.77			152,586.77	
Attachments	$52,834,313.96	$28,983,995.70	$23,682,018.46	$168,299.80	
	12,541,202.06	6,901,423.49	5,639,778.57		Spfd. 55.03%
Parts	$65,375,516.02	$35,885,419.19	$29,321,797.03	$168,299.80	
	7,776,983.07		7,776,983.07		
Totals	$73,152,499.09	$35,885,419.19	$37,098,780.10	$168,299.80	

* Red in copy.

7—75

97

SCHEDULE 4

International Harvester Company

Sales of Motor Trucks, Attachments, and Parts Separated Between Springfield, Fort Wayne, and Other Product Details

1938

Model	Total Proceeds	Springfield Product	Fort Wayne Product	Other Product
D-2	$6,622,384.81	$6,622,384.81	$	
D-5	317,309.19	317,309.19		
D-15	3,450,965.46	3,450,965.46		
D-30	9,274,835.98	9,274,835.98		
DS-30	1,108,379.09	1,108,379.09		
D-300	638,293.25	638,293.25		
DS-300	68,545.96	68,545.96		
D-35	4,343,216.85		4,343,216.85	
DS-35	1,862,073.71		1,862,073.71	
D-40	4,061,144.94		4,061,144.94	
DS-40	234,634.95		234,634.95	
D-50	1,262,664.73		1,262,664.73	
DD-50	6,738.53		6,738.53	
DS-50	46,205.41		46,205.41	
DR-50	243,062.47		243,062.47	
D-60	273,805.93		273,805.93	
DR-60	912,532.62		912,532.62	
DR-70	412,423.73		412,423.73	
DRD-70 6 cyl.	23,490.36		23,490.36	
A-8	173,113.70		173,113.70	
AD-8	5,979.23		5,979.23	
DS-186-T	5,659.71		5,659.71	
D-216-T	59,261.28		59,261.28	
DS-216-T	89,919.71		89,919.71	
D-246-T	93,374.30		93,374.30	
D-246-F	216,795.41		216,795.41	
DR-346-T	54,209.16		54,209.16	
D-346-F	249,866.17		249,866.17	

DR–426–F	178,549.08	.....	178,549.08		
DRD–426–F	6,777.89	.....	6,777.89		
AR–626–F	58,147.79	.....	58,147.79		
D–21–SB & D–31–SB	7,528.19	7,528.19	.....		
D–37–SB	11,374.54	.....	11,374.54		
D–43–SB	10,353.15	.....	10,353.15		
D–49–SB	28,581.83	.....	28,581.83		
D–55–SB	14,670.37	.....	14,670.37		
D–216–F	2,308.01	.....	2,308.01		
DR–246–T	10,618.43	.....	10,618.43		
C–1	85,463.44	85,463.44	.....		
C–5	1,940.97	1,940.97	.....		
[fol. 163]					
C–10, C–20	268.56	268.56	.....		
C–12, C–30, CS–30	13,496.54	13,496.54	.....		
C–35, CS–35, C–35–B, CS–35–B, and C–36	25,985.66	.....	25,985.66		
C–40, CS–40	12,723.64	.....	12,723.64		
C–50, CS–50	12,786.90	.....	12,786.90		
C–55, C–60	42,626.22	.....	42,626.22		
C–35–T, CS–35–T	5,944.00	.....	5,944.00		
C–40–T, CS–40–T, C–40–F	7,139.53	.....	7,139.53		
C–55–T, C–60–T, C–55–F	8,777.46	.....	8,777.46		
M–3	821.78	821.78	.....		
	$36,657,779.62	$21,590,233.22	$15,067,546.40	.....	Spfld. 58.89%
Others	6,940.03	.....	.....	6,940.03	
Barter	76,480.68	.....	.....	76,480.68	
	$36,741,200.33	$21,590,233.22	$15,067,546.40	$83,420.71	
Attachments	9,841,645.07	5,795,744.78	4,045,900.29	.....	Spfld. 58.89%
	$46,582,845.40	$27,385,978.00	$19,113,446.69	$83,420.71	
Parts	8,083,111.47	.....	8,083,111.47	.....	
Total	$54,665,956.87	$27,385,978.00	$27,196,558.16	$83,420.71	

SCHEDULE 5

International Harvester Company

Sales of Motor Trucks, Attachments, and Parts Separated Between Springfield, Fort Wayne, and Other Product Details

1939

Model	Total Proceeds	Springfield Product	Fort Wayne Product	Other Product
D-2	$8,235,347.15	$8,235,347.15	$	
D-2-M	6,692.69	6,692.69		
D-5	302,327.48	302,327.48		
D-15	3,939,477.64	3,939,477.64		
D-15-M	17,987.50	17,987.50		
D-30	10,270,907.53	10,270,907.53		
DS-30	1,912,439.49	1,912,439.49		
D-300	681,188.72	681,188.72		
DS-300	89,025.90	89,025.90		
D-500	29,864.90		29,864.90	
DS-500	2,017.44		2,017.44	
DR-500	6,323.35		6,323.35	
D-35	4,753,165.72		4,753,165.72	
DS-35	2,883,440.79		2,883,440.79	
D-40	4,913,318.24		4,913,318.24	
DS-40	1,392,243.38		1,392,243.38	
D-50	1,053,228.54		1,053,228.54	
DD-50	51,981.36		51,981.36	
DS-50	511,825.51		511,825.51	
DSD-50	22,046.67		22,046.67	
DR-50	621,628.76		621,628.76	
DRD-50	9,711.82		9,711.82	
D-60	256,236.39		256,236.39	
DD-60	3,395.81		3,395.81	
DR-60	980,199.03		980,199.03	
DRD-60	19,775.40		19,775.40	
DR-700	325,682.11		325,682.11	
DRD-70	90,715.22		90,715.22	
A-8	44,845.80		44,845.80	
AD-8	27,696.21		27,696.21	
D-186-T	4,493.41		4,493.41	
DS-186-T	6,771.16		6,771.61	
D-216-T	82,048.83		82,048.83	

DS-216-T	148,784.85		148,784.85		
D-246-T	60,014.27		60,014.27		
DD-246-T	10,495.01		10,495.01		
DR-246-T	53,637.68		53,637.68		
DS-246-T	46,115.02		46,115.02		
D-246-F	376,007.45		376,007.45		
DD-246-F	16,176.02		16,176.02		
DR-346-T	59,268.96		59,268.96		
DRD-346-T	22,949.77		22,949.77		
[fol. 165]					
D-346-F	153,131.08		153,131.08		
DD-346-F	26,309.02		26,309.02		
DR-426-F	80,241.03		80,241.03		
DRD-426-F	23,582.24		23,582.24		
AR-626-F	13,401.22		13,401.22		
ARD-626-F	13,255.37		13,255.37		
D-31-SB	17,475.46	17,475.46			
D-37-SB	15,956.78		15,956.78		
D-43-SB	15,511.86		15,511.86		
D-49-SB	31,658.91		31,658.91		
D-55-SB	40,699.10		40,699.10		
DR-700-T	8,848.41		8,848.41		
D-37-SBB	2,476.56		2,476.56		
D-500-T	2,799.05		2,799.05		
	$44,786,845.07	$25,472,869.56	$19,313,975.51	$	Spfld. 56.87%
Others	21,138.14			21,138.14	
Barter	73,624.15			73,624.15	
	$44,881,607.36	$25,472,869.56	$19,313,975.51	$94,762.29	
Attachmer	12,055,488.89	6,855,956.53	5,199,532.36		Spfld. 56.87%
	$56,937,096.25	$32,328,826.09	$24,513,507.87	$94,762.29	
Parts	10,347,853.96		10,347,853.96		
Total	$67,284,950.21	$32,328,826.09	$34,861,361.83	$94,762.29	

[fol. 166]

EXHIBIT B

International Harvester Company

Sales of Springfield Product

By Ohio Branch Houses

Branch House	Proceeds of Trucks and Attachments	% Springfield	Sales of Springfield Product
1936			
Cincinnati Farm Equipment	$8,097.09		
Cincinnati Motor Truck	897,158.53		
Cleveland Farm Equipment	4,402.78		
Cleveland Motor Truck	1,225,853.53		
Columbus	563,136.67		
Toledo	382,750.53		
	$3,081,399.13	55.455	$1,708,789.89
1937			
Cincinnati Farm Equipment			
Cincinnati Motor Truck	$1,027,256.75		
Cleveland Farm Equipment	3,182.36		
Cleveland Motor Truck	1,450,007.66		
Columbus	649,489.05		
Toledo	445,737.01		
	$3,575,672.83	55.03	$1,967,692.76
1938			
Cincinnati Farm Equipment			
Cincinnati Motor Truck	$791,126.54		
Cleveland Farm Equipment	969.20		
Cleveland Motor Truck	768,113.96		
Columbus	472,281.81		
Toledo	277,669.23		
	$2,310,160.74	58.89	$1,360,453.66
1939			
Cincinnati Farm Equipment			
Cincinnati Motor Truck	983,590.63		
Cleveland Farm Equipment	12,650.14		
Cleveland Motor Truck	1,259,985.94		
Columbus	632,991.71		
Toledo	378,205.64		
	$3,267,424.06	56.87	$1,858,184.06

[fol. 167] EXHIBIT C

International Harvester Company Sales of Works Collateral Parts by Springfield Plants

Year	*Amount*
1934	$252,522.76
1935	549,673.54

[fol. 168] IN THE SUPREME COURT OF THE STATE OF OHIO
INTERNATIONAL HARVESTER CO., APPELLANT,

v.

EVATT, TAX COMMR., APPELLEE

(No. 30316, Decided November 21, 1945)

For the privileges set forth in Section 5495, General Code, the state charges a fee against all corporations doing business in Ohio on the value or proportionate value of the issued and outstanding shares of stock of each such corporation. (Section 5499, General Code.) The amount of this fee is based on the proportion of its property held or used in Ohio and of business done in Ohio by a corporation (domestic or foreign) during the preceding year. This fee is computed under Section 5498, General Code, by first determining the value of the issued and outstanding shares of stock of the corporation. Thereafter a base is determined by dividing the value of the issued and outstanding shares into two equal parts. One part is then multiplied by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wherever situated. The other part is multiplied by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year, wherever transacted. The Tax Commissioner then certifies to the Auditor of State the base determined by him through adding the two figures thus obtained. The auditor makes a charge of one-tenth of one per cent upon the base so certified and in turn certifies the amount of the

fee to the Treasurer of State. The Treasurer then mails to the corporation a statement showing the value or the proportionate value of the shares of stock upon which such fee is charged and the amount of the fee. (Section 5499, General Code.)

The operation of a factory in Ohio constitutes business done in Ohio regardless of where the products of such factory are sold. (Aluminum Co. of America v. Evatt, Tax Commr., 140 Ohio St., 385, approved and followed.)

In computing the numerator of the business-done fraction under Section 5498, General Code, the Tax Commissioner may not be required to deduct therefrom (a) the value of goods sold during the preceding year in interstate commerce or (b) raw materials shipped from outside the state, whether partially fabricated or not, and used in the manufacturing process during the preceding year. (Aluminum Co. of America v. Evatt, Tax Commr., 140 Ohio St., 385, approved and followed).

The volume of sales during the previous year may be used as indicative of the volume of manufacture carried on in an Ohio factory and as a proper element of comparison with the volume of total business done by a corporation in [fol. 169] and out of the state. (Aluminum Co. of America v. Evatt, Tax Commr., 140 Ohio St., 385, approved and followed).

Where a foreign corporation maintains selling branches and warehouses in this state and all sales proceeds both of cash and notes are received by the selling branches and any notes received as part payment are held at the selling branches and interest and principal collected there, the amount of business done in Ohio by such foreign corporation may be measured by the sales made by such selling branches regardless of where products so sold were manufactured or shipped from.

Where a corporation files its annual report with the Department of Taxation and fails to make a claim that it should be required to pay only five-sixths of its annual franchise tax fee by reason of its changing its accounting period from a calendar year to a fiscal year ending October 31, and where upon review under Section 5500, General Code, of the correctness of the determination of the value of its stock or the proportion of such value as made by the Tax Commissioner, the corporation fails to call to the attention of the Tax Commissioner its claim that by reason

of the change of its accounting year from a calendar year to a fiscal year it should not be charged more than five-sixths of the annual fee, such claim, if any, for reduction is thereby waived. The only authority of the Auditor of State is to charge for collection from a corporation doing business in Ohio one-tenth of one per cent upon the value certified by the Tax Commissioner and there is no authority in the Tax Commissioner to compute the business-done portion of the base otherwise than upon the value of the business done by the corporation in this state during the preceding year.

Appeal from the Board of Tax Appeals.

This is an appeal from a decision of the Board of Tax Appeals, under Section 5611-2, General Code. The hearing before the board was upon stipulated facts and evidence.

During the years 1934 to 1939, both inclusive, appellant was a corporation organized under the laws of New Jersey. Its general business and accounting office was located in the city of Chicago, Illinois. Its business consisted of the manufacture of agricultural implements, tractors, motor trucks, binder twine and similar commodities and parts thereof and the sale of such products so manufactured. During the above period appellant owned and operated two factories in Springfield, Ohio, as well as factories in several other states. Throughout the years 1934 and 1935 all products of the appellant's Springfield factories were sold f.o.b. Springfield by the appellant to its subsidiaries, International Harvester Company of America, a Wisconsin corporation, International Harvester Export Company and International Harvester Company of Canada, Limited. During that period all United States sales of appellant's products were made by its subsidiary, International Harvester Company of America. During the years 1936 to 1939, inclusive, appellant marketed its products in this country through dealers located in about 37 states who were independent operators. Appellant's Ohio branches [fol. 170] during this period were located at Columbus, Cincinnati, Toledo and Cleveland. Retail stores and motor truck substations were located in fourteen other Ohio cities.

In its Ohio franchise tax returns for the years 1935 to 1940, inclusive, appellant listed the value of the business done by it in this state during the years preceding the date

of the commencement of its several current annual accounting periods at certain figures. Upon the audit of such returns the Tax Commissioner determined an increased value of the business done in Ohio for each of the several years in question. The difference between appellant's returns and the Tax Commissioner's determinations arose from a disagreement between the appellant and Tax Commissioner as to the meaning of the expression "the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period" as used in Section 5498, General Code. The figures listed by the appellant in its 1935 and 1936 returns included sales of products of appellant's Springfield factories made by the Ohio branches and retail stores of International Harvester Company of America, a subsidiary corporation. In its returns for 1937 to 1940, inclusive, appellant's figures included parts sales made at the Springfield factories plus sales of Ohio made products made by its Ohio branches and retail stores operated directly by appellant, commencing in 1936.

The Tax Commissioner used the value of all sales of the preceding year, wherever the products were delivered, as indicative of the value of the business done during the preceding year at the factories, plus the sales by branches, of goods manufactured outside Ohio but sold to Ohio customers.

The pertinent part of Rule No. 275 of the Tax Commissioner, which the Board of Tax Appeals held to be applicable in the present computation, provides as follows:

"In the case of manufacturing companies, all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state."

In its decision the Board of Tax Appeals stated:

"From a full consideration of the evidence and the stipulations, the board finds that in each of the years 1936 to 1939, inclusive, 62% of the sales of goods manufactured in Ohio and sold to customers in states other than Ohio was sold from warehouses outside the state and, therefore, should be excluded from the numerator of the business fraction in determining the base for the purpose of computing the franchise fee for the years 1937 to 1940, inclusive, and in this respect the action of the Tax Commissioner is modified."

It is contended by appellant that the Board of Tax Appeals erred:

(1) In sustaining the Tax Commissioner in including in the basis of his assessments sales of motor trucks in the years in question where the orders or contracts were solic-
[fol. 171] ited and accepted by appellant's branches outside the state of Ohio, and where the trucks were shipped from appellant's Springfield factories on the direction of such branches direct to buyers in other states;

(2) In including in business done in Ohio sales of motor trucks produced at appellant's Springfield factories where the orders or contracts were solicited and accepted by branches of the appellant outside the state of Ohio and the trucks were shipped by the factory at Springfield direct to buyers in other states on direction of such branches, for the reason that the effect of the inclusion of such sales is to tax property and business of the appellant outside the state of Ohio and, therefore, is invalid under the due process clause of the 14th Amendment to the Constitution of the United States;

(3) In including in business done in Ohio sales of motor trucks produced in appellant's Springfield factories where the orders or contracts were solicited and accepted by branches of the appellant outside Ohio and trucks were shipped by the factory at Springfield direct to buyers in other states on direction of such branches, for the reason that the inclusion of such sales is to lay an unconstitutional burden on interstate commerce in violation of the commerce clause of the Constitution of the United States;

(4) In sustaining the tax assessed for ten months' fiscal period ending October 31, 1936, namely, for the period from January 1 to October 31, 1936, on a full year's basis, whereas such period was only a ten months' period and the tax should have been reduced to five-sixths of the annual tax;

(5) In its decision by making no deduction for the amount of goods sold by branches of the company in Ohio when the goods were shipped direct from factories or transfer houses of the company outside Ohio to buyers in Ohio, while at the same time it included in Ohio business the amount of sales of trucks sold on orders or contracts

solicited and accepted by branches of the company outside Ohio when the goods were shipped from the factory at Springfield direct to buyers in other states;

(6) By including in the business done in Ohio, in the basis of its additional franchise tax assessments for the years 1935 and 1936, based on business done and property held, respectively, in the calendar years 1934 and 1935, sales of motor trucks manufactured at appellant's Springfield factories and sold to appellant's subsidiary when the orders for shipment of such goods were sent by branches of appellant's subsidiaries outside the state of Ohio to appellant's Springfield factories and when the articles were shipped by the Springfield factories to other branches of appellant's subsidiary outside Ohio or to dealers or consumers residing in states outside Ohio.

Mr. O. H. Mosier, of Columbus, and Edward R. Lewis, of Chicago, Ill., for appellant.

Mr. Hugh S. Jenkins, attorney general, and Aubrey A. Wendt, of Columbus, for appellee.

[fol. 172] OPINION

TURNER, J.

For the privileges set forth in Section 5495, General Code, the state charges a fee against all corporations doing business in Ohio on the value or proportionate value of the issued and outstanding shares of stock of each such corporation. (Section 5499, General Code.) The amount of this fee or tax is based on the proportion of the corporation's property held or used in Ohio and of business done in Ohio by such corporation (domestic or foreign) during the preceding year. This fee is computed under Section 5498, General Code, by first determining the value of the issued and outstanding shares of stock of the corporation. Thereafter a base is determined by dividing the value of the issued and outstanding shares into two equal parts. One part is then multiplied by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wheresoever situated. The other part is multiplied by a fraction whose numerator is the value

of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during such year, wherever transacted. The Tax Commissioner then certifies to the Auditor of State the base determined by him through adding the two figures thus obtained. The auditor makes a charge of one-tenth of one per cent upon the base so certified and in turn certifies the amount of the fee to the Treasurer of State. The treasurer then mails to the corporation a statement showing the value or the proportionate value of the shares of stock upon which such fee is charged and the amount of the fee. (Section 5499, General Code.)

This case involves only the method used by the Tax Commissioner to the extent approved by the Board of Tax Appeals for ascertaining the numerator of the business-done part of the formula.

As stated by appellant, a foreign corporation doing business in Ohio, "there is no disagreement between the parties on this appeal as to the total net worth of International Harvester Company to which the Ohio allocation ratio is applied for each year, the amount of appellant's property in Ohio and its total property, and its total business for each of the years involved."

As stated by the Board of Tax Appeals in its journal entry, "consequently, the only matter in dispute is the numerator of the business fraction, which represents the value of the business done by appellant in this state during each of the years involved."

The Tax Commissioner treated the manufacturing done at appellant's factories in Ohio as business done in Ohio. As indicative of the value of such business done, the Tax Commissioner used the sales value of all appellant's Ohio manufactured products sold in the previous year whether to intrastate or interstate commerce.

As the Board of Tax Appeals reduced the Tax Commissioner's use of appellant's Ohio factories' production by 62 per cent on account of manufactured products shipped [fol. 173] from appellant's Ohio factories in each preceding year to warehouses in other states, appellant's complaint is now reduced to the use of 38 per cent of the sales value of the preceding year of products manufactured in Springfield and shipped by the Springfield works during a

preceding year direct to buyers in other states, as indicative of the value of business done at appellant's Ohio factories.

It is our opinion that the method followed by the Tax Commissioner and approved by the Board of Tax Appeals, in ascertaining the amount of business done in Ohio, which is all that is in question in the instant case, follows the procedure approved by the Supreme Court of the United States in the case of American Mfg. Co. v. City of St. Louis, 250 U.S., 459, 63 L. Ed., 1084, 39 S. Ct., 522, as stated by Mr. Justice Pitney at page 460 of that case:

"The question is whether an ordinance of the city of St. Louis, levying against manufacturers, especially as against plaintiff in error, a West Virginia corporation, a tax imposed as a condition of the grant of a license to carry on a manufacturing business in that city, but the amount of which is ascertained by and proportioned to the amount of sales of the manufactured goods, whether sold within or without the state, and whether in domestic or interstate commerce, is void as amounting to a regulation of commerce among the states and thus intrenching upon the power of the national Congress under Art. 1, § 8, of the Constitution, or as amounting to a taking of plaintiff's property without due process of law, in contravention of the 14th Amendment."

In commenting on the American Mfg. Co. case, Mr. Justice Roberts said at page 312 in the case of J. D. Adams Mfg. Co. v. Storem, 304 U. S., 307, 82 L. Ed., 1365, 58 S. Ct., 913, 117 A.L.R., 429: "The tax on the privilege for the ensuing year was measured by a percentage of the past year's sales." This is the method followed in the instant case. See, also, Aponaug Mfg. Co. v. Stone, 314 U. S., 577, 86 L. Ed., 467, 62 S. Ct., 131, affirming the case which arose below in Aponaug Mfg. Co. v. State Tax Commission, 190 Miss., 805, 1 So. (2d) 763; and C. H. Musselman Co. v. Alderson, Tax Commr., 315 U. S. 779, 86 L. Ed., 1187, 62 S. Ct., 580, both decided on authority of American Mfg. Co. v. City of St. Louis, supra.

In coming to its decision in the instant case the Board of Tax Appeals followed the holding of this court in the case of Aluminum Co. of America v. Evatt, Tax Commr., 140 Ohio St., 385, 45 N. E. (2d), 118, in which we held:

"1. The franchise tax levied pursuant to Sections 5498 and 5499, General Code, on a foreign corporation is for the privilege of doing business in this state or owning a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state. (Section 5495, General Code).

"2. 'Doing business' in this state is only a part of the privilege taxed under Section 5495, General Code. The tax also covers the privilege of owning a part or all of the for- [fol. 174] eign corporation's capital or property in this state as well as the privilege of holding a certificate of compliance with the laws of this state.

"3. The Ohio Franchise Tax (Section 5495 et seq., General Code) is not a tax upon commerce, state or interstate. It is not a tax upon income, receipts or sales.

"4. The manufacturing operations within this state by a foreign corporation constitute business done by such corporation in this state within the meaning of Section 5498, General Code.

"5. Tax Commissioner's Rule No. 275 is not unreasonable or unlawful in its application in the instant case. Such rule is favorable to the taxpayer by eliminating from the base upon which the franchise tax is computed goods manufactured in Ohio and sold from warehouses outside of this state. Such rule eliminates the possibility of double taxation on account of 'business done' by the corporation in the state where sales of Ohio-manufactured goods are made from warehouses in such other state.

"6. In computing the numerator of the 'business done' fraction under Section 5498, General Code, the Tax Commissioner may not be required to deduct therefrom (a) goods sold in interstate commerce, (b) raw materials shipped from outside the state, whether partially fabricated or not, (c) the cost of selling goods manufactured in Ohio but sold outside of Ohio, or (d) administrative expense attributable to sales made outside of Ohio of goods manufactured in Ohio.

"7. A franchise tax computed according to the amount of sales of goods manufactured in Ohio, irrespective of whether such goods are sold within or without the state,

in intrastate or interstate commerce, where the payment of the tax is not made a condition of the selling of the goods in interstate or other commerce, but only of continuing in the manufacture of goods within the state, violates neither the commerce clause, Section 8, Article I of the Constitution of the United States, nor the 14th Amendment thereto. (American Mfg. Co. v. City of St. Louis, 250 U. S., 459 followed.)

"8. While a state may not use its taxing power to regulate or burden interstate commerce, on the other hand it is settled by the decisions of the Supreme Court of the United States that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights. (Hump Hairpin Mfg. Co. v. Emerson, Secy. of State, 258 U. S., 290, followed.)

"9. A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing local business, if apportioned to the business done or property owned within the state, is not invalid under the commerce clause of the federal Constitution merely because a part of the property or capital included in computing the tax is used by the corporation in interstate commerce, or because a part of the manufactured product is thereafter sold and shipped [fol. 175] in interstate commerce. (International Shoe Co. v. Shartel, Atty. Genl., 279 U.S., 429, and Hope Natural Gas Co. v. Hall, Tax Commr., 274 U.S. 284, followed.)

"10. The validity of an excise tax upon a foreign corporation depends upon its operating incidence. The application of Section 5498, General Code, and Tax Commissioner's Rule No. 275 in computing appellant's franchise tax for the year 1939 produced no unlawful result under the evidence in this case."

Appellant in brief and argument attempts to treat the Ohio franchise tax as a sales tax, an income tax or a gross receipts tax, which it is not.

It is the contention of appellant that no portion of the value of the products manufactured in Ohio which were sold in interstate commerce may be considered as a measure of the business done in Ohio. In other words, if all the products of a manufacturing plant in Ohio were sold

in interstate commerce in the preceding year it would then follow that the corporation had done no business in Ohio in such factory.

In substance appellant contends that because some of the raw materials used by appellant in its Ohio manufacturing processes during a preceding year came into the state in interstate commerce and some of the finished products of the factories left the state in interstate commerce during a preceding year, the use of the sales value of the finished products of Ohio manufacture as an indication of the value of the business done in Ohio for the preceding year results in laying an unconstitutional burden on interstate commerce and in taxing property and business of the appellant outside Ohio in violation of the due process clause of the United States Constitution.

In support of its contentions appellant cites cases decided by the Supreme Court of the United States involving taxes on income and on gross receipts. As these cases have been commented on in the case of Aluminum Co. of America v. Evatt, Tax Commr., supra, we shall not again review those cases here.

As to the case of International Harvester Co. v. Department of Treasury, 322 U. S. 340, 88 L. Ed., 1313, 64 S. Ct., 1019, cited by appellant, it is only necessary to quote the opening sentence of Mr. Justice Douglas' opinion to wit, "This case raises questions concerning the constitutionality of the Indiana Gross Income Tax Act of 1933 * * * as construed and applied to certain business transactions of appellant companies." We find nothing in that case which would tend to indicate the invalidity of our statutory method of computation of the proportionate value of the issued and outstanding shares of a corporation doing business in Ohio.

This court is committed to the proposition that the operation of a factory in Ohio constitutes business done in Ohio regardless of where the products of such factory are sold.

[fol. 176] We are also committed to the proposition that the volume of sales might be used as indicative of the volume of the manufacturing carried on in such factories and as a proper element of comparison with the volume, similarly computed, of total business done by the corporation in and out of the state.

The present method of determining part of the base upon which to compute the fee, known as the franchise tax, by measuring the volume of business done in Ohio by the value of the sales of the Ohio manufactured products and comparing such result with the total amount of business wherever done computed by the same method, has been in use in Ohio for many years.

On April 15, 1915, the writer, as Attorney General, issued opinion No. 246 (Vol. 1, Opinions of Attorney General (1915), 460) to the Tax Commission of Ohio in the course of which it was said (page 462):

"I am of the opinion that the operation of factories in Ohio by a foreign corporation constitutes 'doing business' in Ohio regardless of where the products of such factory are sold * * * (Citing cases.)

"I am of the opinion that under the provisions of Section 5502, General Code, it is the duty of the commission to select some factor or criterion which will represent the volume of the business done in Ohio as compared with the volume of the business of the company as a whole; and that the business being manufacturing, and all manufacturing being for the purpose of sale, the sales of the products of the factories may be used as such a measure of the volume of the manufacturing business. When so used the sales do not represent commerce at all, but manufacture, and may just as appropriately be used for this purpose as any other criterion, such as the total value of the manufactured articles."

The present formula was spelled out by the General Assembly in 113 Ohio Laws, 637, passed April 6, 1929. Minor amendments were made in 114 Ohio Laws, 762, and 115 Ohio Laws, 589, which latter law became effective July 18, 1933, and is still in force as Section 5498, General Code.

Section 5495 of the General Code of Ohio defines the purpose for which the franchise tax is levied on both domestic and foreign corporations. As to foreign corporations it is provided therein: " * * * and the tax provided by this act for foreign corporations shall be the fee charged against each corporation organized for profit under the laws of any state or country other than Ohio, except as provided herein, for the privilege of doing business in this

state or owning or using a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state, during the calendar year in which such fee is payable."

Section 5499, General Code, charges a fee of one-tenth of one per cent of the value or the proportionate value of the shares of stock upon which such fee is charged.
[fol. 177] Section 5498, General Code, provides the means for determining the value of the outstanding shares of stock of a corporation (domestic or foreign) and prescribes the formula for determining the base upon which the fee provided for in Section 5499 of the General Code shall be computed, to wit: " * * * The commission shall then determine as follows the base upon which the fee provided for in Section 5499 of the General Code shall be computed. Divide into two equal parts the value as above determined of the issued and outstanding shares of stock of each corporation filing such report. Take one part and multiply by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wheresoever situated in each case eliminating any item of good will. (It is agreed that the computation of the foregoing fraction is correct. The dispute is as to the computation under the second part which follows); take the other part and multiply by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year wherever transacted."

Section 5497, General Code, requires every corporation doing business in Ohio to submit to the Department of Taxation certain information including:

"7. The amount of its capital, surplus, whether earned or unearned, undivided profits and reserves, as shown by the books of the corporation. A complete schedule shall be filed with the report showing the object and amount of each such reserve; also there shall be filed with said report a schedule of the annual rates of depreciation and depletion;

"8. The location and value of the property owned or used by the corporation as shown on its books, both within and without the state, given separately; and the total amount of business done and the amount of business done within the state by said corporation during its preceding annual accounting period, given separately. Business done within this state by domestic corporations shall include all business except extra-state business."

Section 5500, General Code, provides for a review of the correctness of the determination of the value of the stock, or the proportion of such value, as made by the Tax Commissioner under the provisions of the act which we have been discussing. In reading these sections of the statute the following provision of Section 1464, General Code, should be kept in mind:

"Whenever in any law of this state, in effect at, or after the time the Tax Commission of Ohio and the offices of commissioners or members of said commission shall, by the provisions of this act, be abolished, the term 'Tax Commission of Ohio,' 'commission,' 'commissioner,' or 'member,' meaning the Tax Commission of Ohio or the offices of the commissioners or members of said commission, which by this act shall have been abolished, is used, such term shall be construed as referring to the Department of Taxation, [fol. 178] the Tax Commissioner, the Board of Tax Appeals, or the members of said Board of Tax Appeals, as the provisions of this act may require."

Appellant also complains of the failure of the Board of Tax Appeals to make a deduction for the amount of goods sold in a preceding year by branches of the company in Ohio when the goods were shipped direct from factories or transfer houses of the company outside Ohio to buyers in Ohio.

We are unable to find any evidence in the record of the amount of any such shipments. The record does contain the following stipulation:

"6. On the sale of goods by a branch, the branch either delivered the article from its own stock in its warehouse at the branch house, or directed that the goods be shipped by the factory direct either to the dealer or, in a very small percentage of cases, to the user."

The record also contains the following stipulation:

"All sales proceeds, both of cash and of notes, are received by the selling branches and any notes received as part payment are held at the selling branches and interest and principal collected there."

The stipulation of facts discloses, for the several years, the amount of sales by Ohio branches to Ohio buyers, of goods manufactured outside Ohio. In its journal entry the board said: "All orders had to be approved by the respective branches, which collected the purchase price of such sales and deposited the money in local banks, which was withdrawable only by the general office in Chicago. Appellant's branches would send shipping orders to the factories to ship goods to the branches for storage in warehouses at the branches until they could sell them, or to ship goods direct to the dealers, and in a few instances, direct to the users." Assuming that such distinction in computing the amount of business done in a preceding year is material and assuming further that the record discloses that "in a few instances" shipments from outside the state were shipped direct to users in Ohio on orders from branches in Ohio, we adopt the following reasoning of the board and hold that the decision of the Board of Tax Appeals was not unreasonable or unlawful in respect thereof, to wit:

"All of the goods which were manufactured out of the state and sold to Ohio customers were shipped on orders received from appellant's branches which it maintained in Ohio, and the board finds that the activities of such branches in this state and their authority in connection therewith constitute doing business within the state regardless of whether such goods were shipped to warehouses of the appellant within the state or directly to customers in Ohio on orders from the branches. In the case of International Harvester Co. of America v. Kentucky, 234 U.S., 579, 58 L. Ed., 1479, the company claimed that so far as the company's activities in Kentucky were concerned, it was engaged solely in interstate commerce and was, therefore, not subject to the jurisdicition of the state. The court held, however, that the continuous solicitation of orders through [fol. 179] local agents of the company of goods manufactured outside the state and delivered into the state, the agents having authority to receive money and notes for

the purchase price of such goods, constituted doing business in Kentucky. See, also, on this point, International Harvester Co. v. Department of Treasury, 322 U.S., 340, 88 L. Ed., 1313."

Under the Tax Commissioner's Rule No. 275, the Board of Tax Appeals eliminated from consideration 62 per cent of the volume of goods manufactured at appellant's Ohio factories, on the ground that such proportion of appellant's Ohio manufactured products were shipped to warehouses *outside* Ohio. For the governmental protection to appellant's 100 per cent manufacturing operations in Ohio the Department of Taxation has based its computation of the business fraction upon 38 per cent of the business done in Ohio at appellant's factories. By the use of Rule 275, the Board of Tax Appeals made a substantial reduction in the fee to be paid by appellant.

A subsidiary question is set out in appellant's brief. This question was brought about by appellant changing its accounting period from the calendar year to the fiscal year, which appellant claims resulted in assessing a full year's tax for a ten months' period. During the hearing before the board no complaint was made on that score so far as the record discloses. The only mention of such matter in the record is to be found in explanatory notes to appellant's exhibits, to the effect that the company had changed its accounting year to a fiscal year ending October 31. In its application for rehearing by the Board of Tax Appeals appellant states that no consideration was given to the point made in appellant's brief in respect to the fiscal period ended October 31, 1936. An examination of appellant's annual report for 1936 (a part of the period here) filed with the Tax Commission by appellant gives the date of beginning of the current annual accounting period as January 1, 1936. The 1937 report gives the date of the beginning as November 1, 1936, but there is no claim in either report that the company is not liable for the fee for a full year. The record does not disclose that such matter was brought to the attention of the Tax Commissioner upon review under Section 5500, General Code. Therefore such claim, if any, is waived. There is no provision in the statutes for remitting any portion of the fee. The only authority of the Auditor of State is to charge for collection from a corporation doing business in Ohio one-tenth

of one per cent on the valve certified by the Tax Commissioner (Section 5499, General Code), and there is no authority in the Tax Commissioner to compute the business-done portion of the base otherwise than upon the value of the business done by the corporation during the preceding year. (Section 5498, General Code.)

The form of reports for 1936 does contain the statement: "A corporation which filed its statement for admission to do business with the Secretary of State of Ohio on or after January 1, 1936, will not be required to file an annual report until 1937." Similarly the 1937 form makes the first filing date after admission as 1938. We hold that the decision of the Board of Tax Appeals is not unreasonable or unlawful in this respect.

As pointed out above, the instant case does not involve [fols. 180-180-A] a tax on sales or income but is solely a fee charged upon the value or proportionate value of the shares of stock of a corporation for the privilege of doing business in Ohio and of owning a part or all of its capital in this state or for a holding of the certificate of compliance of this state authorizing it to do business in this state and is computed in part on business done in a year preceding the year for which the fee is assessed. In the Aluminum Co. of America case, *supra,* which we approve and follow here, and in the instant case, we relied upon and now rely upon, *inter alia,* American Mfg. Co. v. City of St. Louis, 250 U.S., 459, 63 L. Ed., 1084, 39 S.Ct., 522; Hump Hairpin Mfg. Co. v. Emerson, Secy. of State, 258 U.S., 290, 66 L. Ed., 622, 42 S.Ct., 305; International Shoe Co. v. Shartel, Atty. Genl., 279 U.S., 429, 73 L. Ed. 781, 49 S.Ct., 380; and Hope Natural Gas Co. v. Hall, Tax Commr., 274 U.S. 284, 71 L. Ed., 1049, 47 S.Ct., 639.

The record in this case discloses no instance of double taxation.

Upon hearing and consideration of the record and evidence in this case we are of the opinion that the decision of the Board of Tax Appeals appealed from is reasonable and lawful and, therefore, that decision should be and hereby is affirmed.

Decision affirmed.

Weygandt, C. J., Zimmerman, Matthias and Hart, JJ., concur.

Bell, J., concurs in paragraphs two, three, four, five and six of the syllabus and in the judgment.

Williams, J., not participating.

[fol. 181] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON BY APPELLANT, AND DESIGNATION BY APPELLANT OF THE PARTS OF THE RECORD TO BE OMITTED FROM THE PRINTED RECORD, WITH PROOF OF SERVICE THEREOF—Filed April 12, 1946

Pursuant to Rule 13, Paragraph 9, of this Court, Appellant states that the points upon which it intends to rely on this Appeal are as follows:

1. The Supreme Court of the State of Ohio erred in including in business done in Ohio, in the computation of Appellant's Ohio Franchise Taxes for the years involved in this Appeal, the proceeds received by Appellant from the sale of motor trucks when the orders or contracts were solicited and accepted by branches of International Harvester Company outside the State of Ohio, and when the trucks were shipped from the Springfield plant of International Harvester Company at Springfield, Ohio, which manufactured said trucks, on the direction of said branches direct to the buyers in other states and in foreign countries, for the reason that the effect of the inclusion of said sales is to tax property and business of Appellant outside the State of Ohio, and therefore a denial of due process of law under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of the State of Ohio erred in including in business done in Ohio, in the computation of Appellant's Ohio Franchise Taxes for the years involved in this Appeal, the proceeds received by Appellant from the sale of motor trucks when the orders or contracts were solicited and accepted by branches of Interna-

[fol. 182] tional Harvester Company outside the State of Ohio, and when the trucks were shipped from the Springfield plant of International Harvester Company at Springfield, Ohio, which manufactured said trucks, on the direction of said branches direct to the buyers in other states and in foreign countries, for the reason that the inclusion of

such sales is to lay an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the Constitution of the United States.

Appellant further states that the following designated parts of the Transcript of Record, prepared by the Clerk of the Court below, are not necessary for the consideration of the foregoing "Statement of Points" and should be omitted from the Printed Record herein, viz:

(1) Citation to Appellee (page 7).

(2) Service of Appeal Papers (page 8).

(3) Acknowledgment of Service of Appeal Papers (page 9).

(4) Appellant's Statement as to Jurisdiction (pages 10 to 43 inclusive).

(5) Praecipe for Record and Designation of Portions of Record to be Incorporated into Transcript (pages 57 to 58).

(6) Appeal Bond for Costs (pages 59 and 60).

(7) Ohio Supreme Court Clerk's Minutes (pages 61 and 62).

(8) Ohio Supreme Court Clerk's Journal Entries (page 63).

(9) From the Printed Record of the Supreme Court of Ohio the following should be omitted:

(a) From page 78, line 3, omit down to and including line 13 on the reverse of page 83, namely down to the words in the middle of the page "Charles L. Johns."

(b) Omit from beginning with line 11 on page 84 to bottom of page 90.

(c) Omit beginning with 4th line from bottom of the reverse of page 91 down to and including line 21 on the reverse of page 96, namely down to and including the line reading "withdrawing them."

(d) Omit on the reverse page of page 102 beginning with the 15th line, namely the line reading as follows:

[fol. 183] "Chairman Ford: At this point we will take a short" and all the rest of the reverse page of page

102, and all of pages 103, 104, 105 and 106 down to and including the 12th line on the reverse side of page 106, namely to the line reading "thousand, whatever it is."

(10) Omit Appellant's Exhibit 1, page 122, selling locations of International Harvester Company of America in 1934 and 1935.

(11) Omit pages 131 to 136 inclusive.

(12) Omit the certificate of the Clerk of the Supreme Court of Ohio.

Appellant designates all the remainder of the Record to be included in the Printed Record.

Dated this 10th day of April, 1946.

Edward R. Lewis, Joseph J. Daniels, O. H. Mosier,
Attorneys for Appellant.

PROOF OF SERVICE

STATE OF OHIO,
County of Franklin, ss.

O. H. Mosier, being first duly sworn, upon oath says that on the 11th day of April, 1946, he served on Hugh S. Jennings, Attorney General of the State of Ohio, a true copy of the above and foregoing "Statement of Points to be Relied Upon by Appellant, and Designation by Appellant of the Parts of the Record to be Omitted from the Printed Record, with Proof of Service Thereof," as evidenced by the Receipt therefor appearing below, signed in his presence by said Hugh S. Jennings as Attorney General.

O. H. Mosier.

Subscribed and sworn to before me, the undersigned Notary Public in and for said County and State, this 11th day of April, 1946. Witness my hand and Notarial Seal.
Annabel H. Miller, Notary Public, Annabel H. Miller.

[fol. 184] RECEIPT

Receipt of a true copy of the foregoing Statement of Points to be Relied Upon by Appellant, and Designation by

Appellant of the Parts of the Record to be Omitted from the Printed Record, with Proof of Service Thereof, is hereby acknowledged this 11 day of April, 1946.

Hugh S. Jenkins, Attorney General for the State of Ohio, Attorney for Appellee, Aubrey A. Wendt, Asst. Attorney General for the State of Ohio.

[fol. 184-A] File endorsement omitted.

[fol. 185] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—May 6, 1946.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Jackson took no part in the consideration or decision of this question.

Endorsed on Cover: File No. 50722 Ohio, Supreme Court. Term No. 75. International Harvester Company, Appellant, vs. Tax Commissioner of Ohio. Filed March 29, 1946. Term No. 75. O. T. 1946.